'following or failing to follow certain standards met or failed to meet the applicable legal standard,' such as the 'reasonableness' of [the Defendant officers'] actions." *Sloan v. Long*, No. 4:16-CV-86, 2018 WL1243664, at *4 (E.D. Mo. Mar. 9, 2018) (citation omitted).

Donnelly's legal conclusions cannot be saved by his report's preface that these opinions and language were "not meant to encroach upon the authority of any court or the final determination of the jury." ECF No. 170-1 at 7. Despite such disclaimers, Donnelly is still a lawyer using legal language to make conclusions of law about the ultimate issues in this case. *See Lombardo v. City of St. Louis*, No. 4:16-CV-01637, 2019 WL 414773, at *8, 10 (E.D. Mo. Feb. 1, 2019) (excluding expert testimony that constituted impermissible legal conclusions despite the expert's statement that they were "not a lawyer" and "d[id] not offer legal conclusions").

To the extent that Donnelly intends to opine on the reasonableness of the police conduct, describe legal standards, or the connection (if any) between general industry practice and legal and constitutional standards, the Court concludes that such testimony is inadmissible.

Credibility and Factual Conclusions

Plaintiffs also raise concerns that Donnelly misstates and misapplies facts in order to reach preconceived conclusions in a way that does not satisfy the reliability requirement. "[A]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true." *Williams v. Illinois*, 567 U.S. 50, 57 (2012). "However, there is a critical distinction between an expert testifying that a disputed fact actually occurred or that one witness is more credible than another and an expert giving an opinion based upon factual assumptions, the validity of which are for the jury to determine." *Sloan*, 2018 WL 1243664, at *4 (citation omitted). Donnelly does the former when he gives his own recitation of facts in this case.

Donnelly purports to give a "Summary of Events" in paragraphs 16 to 72 of his report. *See* ECF No. 170-1 at 8-16. This recitation of facts does not come with any disclaimer that these are the factual assumptions on which Donnelly's opinions lie. Rather, the testimony reiterates the facts as stated by the Defendants and suggests Defendants' version of events are more credible. Donnelly's factual testimony continues into the issuance of his opinions and conclusions as well. For example, Donnelly opines that "the use of four separate lines . . . that encircled the protestors and were utilized to contain the protestors who had refused to obey the dispersal orders[] met with generally accepted law enforcement industry standards." *Id.* at 19. This opinion is not only a legal conclusion, but one that rests upon an endorsement of the facts as testified to by Defendants.

It is the province of the jury to settle factual disputes. Where there are conflicting descriptions of events, rulings on expert testimony are intended to protect the "exclusive province of the jury to determine the believability of the witness. . . . An expert is not permitted to offer an opinion as to the believability or truthfulness of a [witness]'s story." *Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir. 1992) (citations omitted). In cases involving alleged police misconduct, such factual determinations include "what facts were known to the officers at the time of arrest." *Peterson*, 60 F.3d at 475.

Here, there is much dispute over the facts of the case, including what facts the officers knew or should have known at the time of Plaintiffs' arrest. That dispute must be settled by the jury. Accordingly, Donnelly may not testify as to which version of events occurred here, what facts were available to the officers at the time of their alleged misconduct, nor may he endorse the Defendants' version of events as true.

Testimony Regarding General Industry Practice and Standards

"By contrast, expert testimony on industry practice or standards is admissible." *Lombardo*, 2019 WL 414773, at *8 (citing *S. Pine Helicopters*, 320 F.3d at 841). Expert testimony is intended to "contextualize the evidence" that the jury will hear about police conduct in light of the general industry practices and standards. *Id.* at *10 (quoting *Sloan*, 2018 WL 1243664, at *3). Donnelly's testimony must be limited to opinions that will assist the jury in understanding the evidence or in determining a fact in issue. *See* Fed. R. Evid. 702.

To the extent that Donnelly intends to opine on general industry standards and practices, and whether such standards and practices were applicable here, such testimony would be admissible. Donnelly may not testify that the amount of force here was reasonable, but he may testify, for example, that "[c]hemical agents are often utilized in mass arrest situations due to the inherent danger with large, emotionally charged crowds . . . ." ECF No. 170-1 at 29. Similarly, Donnelly may apply such standards to hypothetical scenarios, including those that mirror the facts alleged by the parties in this case. *See Sloan,* 2018 WL 1243664, at *4. For example, Donnelly may be asked a question along the lines of: "[a]ssuming this set of facts, might a reasonable officer conclude or do X?" *Id.* at *4 (citation omitted). Such statements would communicate general industry standards and practices that would help contextualize the situation for the jury without making conclusions of law on behalf of the court or findings of fact on behalf of the jury. However, Donnelly may not endorse any one of the factual accounts of the events giving rise to this action, and therefore cannot reach any ultimate conclusions about the reasonableness of Defendants' conduct.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Plaintiffs' motion to disqualify and exclude the report and testimony of Eric Donnelly is **GRANTED in part and DENIED in part**, as set forth above. Donnelly's report and testimony will be excluded except to the extent that it provides fact-based context regarding general industry standards and practices, subject to reconsideration if drawing the distinction proves to be impracticable.

Applicant Details

First Name	**Sophie**
Last Name	**Lombardo**
Citizenship Status	**U. S. Citizen**
Email Address	**sophie_lombardo@berkeley.edu**
Address	**Address** Street **2910 Fulton Street, Apt 4** City **Berkeley** State/Territory **California** Zip **94705** Country **United States**
Contact Phone Number	**2243210250**

Applicant Education

BA/BS From	**Washington University in St. Louis**
Date of BA/BS	**May 2018**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Berkeley Law Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Robert-Gordon, Alexandra
arobertgordon@law.berkeley.edu
Brooks-Rubin, Brad
brooks-rubinba@state.gov
Fletcher, Laurel
lfletcher@law.berkeley.edu
510-643-4792

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SOPHIE LOMBARDO
2910 Fulton Street, Apt. 4, Berkeley, CA 94705
224.321.0250 • sophie_lombardo@berkeley.edu

June 4, 2023

The Honorable Leslie Abrams Gardner
United States District Court
Middle District of Georgia
C.B. King United States Courthouse
201 West Broad Avenue
Albany, GA 31701

Dear Judge Gardner,

I am a third-year law student at the University of California, Berkeley, School of Law, and I am writing to apply for a clerkship in your chambers for the 2024-2026 term. As an aspiring human rights lawyer, I intend to move to the South upon graduating because I believe it is where the most vital and vibrant legal advocacy is happening. It would be a true privilege to learn from your experiences—not only as a judge, but as an attorney committed to advancing social justice through the law.

Prior to law school, I worked for The Sentry, an organization dedicated to disrupting the networks that profit from mass atrocities. As an investigator, I worked with whistleblowers in South Sudan, Zimbabwe, and diaspora communities to shed light on everything from public procurement fraud and environmental crime to banking sector malfeasance. Routinely immersing myself in new country contexts, legal codes, and policy tools taught me to juggle multiple complex subjects at once; to transform tangled masses of data into human stories; and to write with precision.

These experiences informed my decision to go to law school, and they solidified my commitment to advancing human rights in my own community, first with the Office of the Federal Public Defender, and more recently, with Mississippi's MacArthur Justice Center. Drafting motions and conducting legal research not only bolstered my writing abilities and encouraged me to explore inventive legal arguments, but it also introduced me to emerging challenges for due process and civil rights. If given the opportunity, I would look forward to honing these skills as a member of your team.

Enclosed please find a copy of my resume, my law school transcript, my writing sample, and letters of recommendation from Judge Alexandra Robert-Gordon (alexandra.rg@berkeley.edu), Professor Laurel Fletcher (lfletcher@clinical.law.berkeley.edu), and Mr. Brad Brooks-Rubin (brooks-rubinba@state.gov). I would welcome the opportunity to serve the people of the Middle District of Georgia and to establish stronger ties to the region I hope to soon call home.

Thank you for your consideration.

Respectfully,

Sophie Lombardo

SOPHIE LOMBARDO

2910 Fulton Street, Apt. 4, Berkeley, CA 94705
224.321.0250 • sophie_lombardo@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2024 | Human Rights Center Scholar

Honors: Second-Year Academic Distinction (Top 25%)

Activities: Director, Berkeley Law Moot Court Team; Articles Editor, *Berkeley Journal of International Law*; Member, BLAST Mississippi; Member, Queer Caucus

Washington University in St. Louis, St. Louis, MO
B.A., *cum laude*, History, Honors with Highest Distinction (Minor: Creative Writing), May 2018
Honors Thesis: "Robert M.W. Kempner and the Politics of Postwar Justice"

Honors: 2018 Goldstein Prize for Best Senior Honors Thesis; 2018 Boysko Award in Creative Nonfiction

Activities: Editor, *Gateway History Journal*; Student Member, WUSTL Holocaust Memorial Lecture Committee

Study Abroad: Danish Institute for Study Abroad, Program in Justice & Human Rights (Spring 2017)

EXPERIENCE

Wilson, Sonsini, Goodrich & Rosati | Washington, DC — May 2023-present
Summer Associate, Complex Litigation and Investigations

- Complete legal research and fact-intensive assignments on white collar matters and pro bono projects.

Human Rights Center, Berkeley School of Law | Berkeley, CA — June 2022-present
Graduate Student Researcher / Miller Fellow

- Conducted legal research and contributed to an Article 15 Communication to the International Criminal Court, presenting the case for charging cyberattacks on Ukraine's critical infrastructure as war crimes.

Office of the Federal Public Defender | Portland, OR — June-Aug. 2022
Summer Law Clerk

- Completed substantive legal research and writing on questions of federal and state criminal law, including motions for compassionate release and early termination. Reviewed discovery for ongoing civil litigation.

The Sentry | Washington, D.C. — Sept. 2018-Aug. 2021
Investigator / Researcher

- Investigated white collar crime linked to mass atrocities in South Sudan and Zimbabwe, particularly in extractives and procurement. Authored reports and gave interviews reflecting organizational priorities.
- Briefed government officials, banks, and multilateral bodies, including the U.N. Security Council's Panel of Experts, on evidence-based solutions to illicit finance risks.

Auschwitz Jewish Center |Oswiécim, Poland — June-July 2018
Summer Fellow

- Engaged survivors of mass atrocity, activists, and scholars in Poland on historical and contemporary relationships to Judaism and the Holocaust. Published an article in the Center's annual alumni journal.

University of Colorado-Boulder | Boulder, CO — June-Aug. 2016
Bender Mazal Research Fellow

- Conducted archival research and authored educational supplements for Dr. David Shneer's graduate seminar on Genocide & the Holocaust.

ADDITIONAL INFORMATION

Certifications: Certified Anti-Money Laundering Specialist (CAMS) (2020)

Interests: Rock climbing; cooking; reading fiction

Berkeley Law
University of California
Office of the Registrar

Sophie K Lombardo
Student ID: 3037183837
Admit Term: 2021 Fall

Printed: 2023-06-09 06:09

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2022 Spr: Written and Oral Advocacy
Jurisprudence Award 2023 Spr: International Law

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Sean Farhang	5.0	5.0	P
LAW	201	Torts Daniel Farber	4.0	4.0	P
LAW	202.1A	Legal Research and Writing Patricia Plunkett Hurley	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Glater	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Patricia Plunkett Hurley	2.0	2.0	HH
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	P
LAW	203	Property Molly Van Houweling	4.0	4.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Jennifer Chacon	4.0	4.0	P
LAW	226.12	Media Law&the First Amendment Geoffrey King Diana Baranetsky	1.0	1.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	31.0	31.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	H
LAW	241	Evidence Jonah Gelbach	4.0	4.0	HH
LAW	243	Appellate Advocacy **Fulfills Writing Requirement** Alexandra Robert-Gordon	3.0	3.0	P
LAW	264.6	Health and Human Rights Eric Stover Rohini Haar	3.0	3.0	HH

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	45.0	45.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	261	International Law Katerina Linos	4.0	4.0	HH
LAW	283H	Intl Human Rights Clinic Sem Laurel Fletcher	2.0	2.0	CR
LAW	286.5	Federal Indian Law Richard Davis	4.0	4.0	P
LAW	295.5H	Intl Human Rights Law Clinic **Units Count Toward Experiential Requirement** Tayyiba Bajwa Laurel Fletcher	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	59.0	59.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

Berkeley Law
University of California
Office of the Registrar

Sophie K Lombardo
Student ID: 3037183837
Admit Term: 2021 Fall

Printed: 2023-06-09 06:09
Page 2 of 2

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	220.9	First Amendment Erwin Chemerinsky	3.0	3.0	
LAW	261.73	Self Determ. Ppl in Intern Law Asa Solway	1.0	1.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	59.0	59.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

4 June, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write in support of Sophie Lombardo's application to serve as a clerk in your chambers. Sophie was a student in my Appellate Advocacy class in the fall of 2022, and I was extremely impressed by her intellectual abilities, her writing prowess, and her maturity. Sophie is a terrific combination of a strong student and an even more amazing human being. Anyone would be lucky to work with her.

I am very familiar with Sophie's writing and research skills because I reviewed multiple drafts of her work. Having served as a law clerk in District Court, a Staff Attorney at the Ninth Circuit, and now as a Superior Court judge, I know what it takes to excel in chambers. Quite simply, Sophie has an abundance of what it takes.

In Appellate Advocacy, students brief and argue a case currently pending in the California Supreme Court, following the rules of court as closely as the classroom experience allows. By reputation, it is one of the hardest classes at Berkeley Law. Students have about two weeks to research the law and absorb the record, and they must do this while learning how to write a persuasive, full-length appellate brief.

Sophie briefed and argued Taking Offense v. State of California, which involved a First Amendment challenge to a provision of the Health and Safety Code the Lesbian, Gay, Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights that criminalizes the willful and repeated failure to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns. Although the trial court upheld the law, the Court of Appeal reversed and held that the misgendering provision is facially unconstitutional. It reasoned that the misgendering provision is a content-based restriction of speech subject to strict scrutiny under the First Amendment. While it agreed with the State that the government had a compelling interest in eliminating discrimination on the basis of sex, including on the basis of "transgender status," the appellate court determined that the misgendering provision was "overinclusive" and thus not narrowly tailored to further the State's interest.

Every case my colleagues and I have selected over the years seems to be particularly challenging, and Taking Offense was no exception. I did not realize when we picked this case that Berkeley Law does not include the First Amendment in its constitutional law course and, consequently, that none of the students had any meaningful knowledge of the First Amendment. What this meant was that the students had to learn most of the major First Amendment doctrines while researching, structuring, and writing their arguments and learning about what makes for persuasive advocacy.

My sense is that in addition to the legal complexity involved, for Sophie, a gay woman, the subject matter presented emotional complexity as well. This difficulty only seemed to strengthen her resolve. Amazingly, she was able to channel it into a brief that was sophisticated, well-reasoned, and well supported. Many students had difficulty reconciling First Amendment free speech jurisprudence with anti-discrimination law. Sophie went deep, researched the issues extensively, and crafted an argument about how misgendering is discrimination and thus not protected expressive speech that can fairly be described as beautiful. My comments on her writing range from "well done" to "gorgeous" to "awesome." Although she did not achieve an honors grade in my class, this is only because due to a personal issue that has resolved, her brief was late and per our policy, had to be marked down. Her grade in no way reflects her achievement, which was impressive.

Sophie also excelled at the oral advocacy portion of the class. She delivered a rebuttal argument that was so stunning it literally (and I promise uncharacteristically) brought me to tears. The fact that she has won the Prosser Prize for written and oral advocacy in her first year is further evidence of Sophie's considerable skills. Her instincts are exceptional, and I am so pleased that she has continued to challenge herself (successfully) through participation in appellate advocacy competitions.

Notably, Sophie was able to produce such high-quality work while also excelling in her other courses and participating in numerous extracurricular activities. Among other pursuits, she is the director of Berkeley Law Moot Court Team, a graduate researcher and a Miller Fellow at the Human Rights Center, Articles Editor of the Berkeley Journal of International Law, and a member of BLAST Mississippi, which is a collaboration with the MacArthur Center for Justice. As is evident from Sophie's resume, she has a strong commitment to human rights and social justice. Starting in high school, she has written and lectured on the Holocaust, coauthored several reports on corruption and human rights in South Sudan and Zimbabwe, and mentored LGBT youth.

Sophie is a rare gem of a human being with an abiding passion for making the world a better and fairer place. She was an absolute pleasure to have in class and she would be a wonderful addition to any chambers.

I unreservedly recommend Sophie. If you have any questions or I can be of further help, please do not hesitate to call me.

Sincerely,

/s/ Alexandra Robert Gordon

Alexandra Robert-Gordon - arobertgordon@law.berkeley.edu

Hon. Alexandra Robert Gordon

Alexandra Robert-Gordon - arobertgordon@law.berkeley.edu

Brad Brooks-Rubin
1713 Kilbourne Pl NW
Washington DC 20010
June 2, 2023

Your Honor:

I write strongly and enthusiastically to recommend Sophie Lombardo for a judicial clerkship. I had the privilege of serving as the Managing Director of The Sentry during Sophie's tenure at the organization and watching her develop and grow quickly into one of the most trusted and reliable investigators and writers at the organization, even though she was just out of college and had years – even decades – less experience than her other, more senior colleagues. She has continued to challenge herself and advance in law school, and she will be an invaluable asset to any chambers that offers her a clerkship.

Sophie began her tenure at The Sentry directly from college, starting alongside two more experienced colleagues in our first cohort of junior investigators, joining a team of seasoned investigative journalists, former U.S. government intelligence and law enforcement personnel, and human rights advocates. Within a few months, it became clear that Sophie possessed impressive qualities as an investigator, which also clearly continue to serve her in law school and will as a clerk: curiosity, persistence, rigorousness, integrity, intellectual (and personal) honesty, willingness to challenge herself, and collegiality. The junior investigator program was a new one for the organization, and not every element was fully fleshed out and operational, but Sophie not only remained patient and flexible as the program adjusted, but she concentrated on learning and growing as much as possible and focusing on the substantive skills development.

She quickly displayed the above-referenced qualities in taking on challenging projects working with more senior investigators, particularly on South Sudan. The Sentry investigates conflict, human rights abuse, financial crime, and corruption in East and Central Africa (and has since expanded to other regions), and the issues can be difficult both intellectually and psychologically/emotionally, given the terrible impacts on the people of the affected countries and regions but often dearth of evidence that can be used in public reporting. Sophie was endlessly curious and dedicated in diving in to difficult issues, taking direction well, developing sources, identifying and exploring new directions, documenting her work rigorously, acknowledging when she'd hit a dead end, and willing to dive in for the long haul or abandon a project that turned out to be a good, but not executable, idea.

Within 6 months of her starting at The Sentry, my problem as the Managing Director was not that she was out of her depth or inexperienced as a new investigator but that she was in too much demand. Whenever any senior investigator needed assistance working through a large set of documents, developing a new idea, or found themselves stuck and in need of a new approach, the request was always the same: can I work with Sophie? She was always willing to help but learned over time the importance of identifying her limitations, following her instincts, and asking supervisors for guidance.

Two projects stand out from her time that demonstrate the qualities noted above. First, when one of our most dedicated researchers, perhaps the world's expert in her field, needed assistance working through massive troves of documents – most of which in languages that Sophie did not speak –

she still asked for Sophie. When we offered other team members who did speak the relevant languages, the response was that the researcher knew that Sophie would be what she needed to work through the details, ask the right questions, identify the missing pieces, and suggest the best follow up. That is, the researcher knew she would have command of the details but sought Sophie's instincts, judgment, and simply her collaboration to sift through those details and figure out how to present them in a public report. The project lasted a few months, but it turned out to be pivotal in the production of impactful reports.

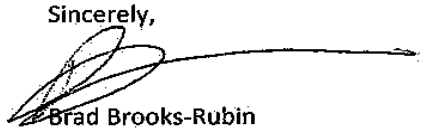
Second, when the team decided to follow the threads on an interesting but shadowy figure in South Sudan and see where it led, Sophie was again chosen as the investigator. The work involved her following up on bits of information connected to multiple countries and sectors, cold contacting a wide array of individuals and entities in these jurisdictions, learning to ask the right questions to elicit what she could learn, and then developing the plan for the next steps of the investigation. There were plenty of dead ends, but Sophie remained steadfast but clear-eyed that she would only ever learn so much. Over time, the story came together and turned into a fascinating investigation and public report. In this case, as with the previous one, her supervising investigator was located on another continent and in a different time zone, but Sophie was motivated and disciplined throughout, seeking guidance and direction as needed but working independently and with purpose.

In addition to the challenging content and expectations – indeed, because of them -- The Sentry's Investigations Department was, in all honesty, not an easy place to work. Sophie showed remarkable character and judgment in navigating a range of challenging dynamics (not of her causing) that rankled many other colleagues. She found her voice, possessed impeccable judgment, and as noted, became a colleague that everyone trusted and relied on to share confidences and think through how to approach difficult conversations and circumstances.

Finally, and perhaps most of all, Sophie is a genuinely good person to be around and spend time with. When you are dealing with intellectually and emotionally challenging and draining content and context, as you are in a chambers just as we were at The Sentry, that quality may perhaps be the most important of all.

Best of luck with the hiring process.

Sincerely,



Brad Brooks-Rubin

June 06, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

It is with great pleasure that I write with my highest recommendation for Sophie Lombardo to serve as a law clerk in your chambers. I had the pleasure of working closely with Sophie, as her professor and supervisor, in Berkeley Law's International Human Rights Law Clinic (IHRLC) in Spring 2023. Based on the strength of her performance, we invited Sophie to return to the Clinic in the Fall 2023 semester.

Sophie has demonstrated her excellence in legal research and writing in and outside of the classroom at Berkeley Law. She received High Honors (top 10%) in several courses and received the Prosser Prize (second highest grade) in her Written and Oral Advocacy class. She contributes to the intellectual life of the community through her leadership positions in several student organizations. Across all dimensions of her work, Sophie performs at the highest levels. I am confident that she will be an excellent clerk.

Background

The International Human Rights Law Clinic is an academic program I co-direct that marshals the resources of the faculty and students of Berkeley Law to advance the struggle for human rights on behalf of individuals and marginalized communities. Students in their second or third year enroll in the Clinic and its companion seminar for approximately one-half of their course load. Students conduct human rights advocacy under close faculty supervision in a small, tight knit learning environment. Sophie was one of approximately 14 students enrolled in the Clinic and was one of six students to work under my direct supervision.

The intimate learning environment in a clinical setting enables faculty to observe students perform a variety of legal advocacy skills. I became well-acquainted with Sophie over fourteen weeks. Outside of our seminar session, I met at least weekly with Sophie in supervision meetings, client meetings, and in individual consultations. I can say with confidence that she is an exceptional student. She has sharp analytical skills, exceptional research and writing abilities, and an enviable work ethic. In short, she has the "whole package" of smarts, skills, and commitment to public service.

Clinical Work Product

Around the world, human rights defenders (HRDs) are under increased threat from repressive governments. There is an urgent need for mechanisms to protect defenders and enable them to conduct their activities in safety. During her time in Clinic, Sophie worked on a project for a United Nations independent human rights expert, referred to as a Special Rapporteur, regarding temporary humanitarian visas for human rights defenders (HRDs). These visas can form a vital part of security strategies for HRDs when they need to leave their home country for a period of time due to increased risks they face.

The number of governments that provide temporary visa support to HRDs is extremely limited. Furthermore, when such schemes do exist, governments are sometimes reluctant to publicize them for fear of being inundated with applications. Thus, mapping the global landscape of relevant visa and relocations programs was not a straightforward nor easy task. Specifically, Sophie undertook a global survey of national immigration frameworks, identifying programs that offered specialized relocation mechanisms for human rights defenders (HRDs). She also canvassed the web to identify more than one hundred cities globally, in which non-government actors led similar initiatives. Sophie's team conducted extensive research and analysis on the existing visa schemes and temporary relocation programs to equip the Special Rapporteur as she made recommendations to governments on this important topic. The final work product was a 30-page analysis of current programs, with policy recommendations.

Sophie's Clinical Work Displays Excellent Research, Writing, and Analytical Skills

Sophie approached her research with a creative eye and a fine-toothed comb. Relying on methods that she developed as an investigator prior to law school, Sophie turned over every source available to create a database compiling the team's data as well as a map displaying their findings. The Special Rapporteur, with her decades of experience, was surprised to learn of programs that Sophie brought to her attention. It is truly a credit to Sophie's diligence and dedication to research that she was able to extend the Special Rapporteur's knowledge of the topic.

The UN is extremely cautious in who it permits to conduct research on its behalf because the reputational and material stakes are so high. Based on her careful desk research, the Special Rapporteur entrusted Sophie to conduct interviews with leading governments and humanitarian organizations about their work and views on the subject. It is a testament to Sophie's research skills and professional judgement that the Special Rapporteur made personal introductions to key stakeholders, soliciting their agreement to an interview with Sophie. Sophie further impressed the Special Rapporteur by focusing attention on the gaps about the nature and scope of temporary visa schemes to generate an interview guide for the stakeholder interviews. She conducted interviews with experts in Africa, Central America, and the United States. For each interview, Sophie prepared thoroughly and

demonstrated her mastery of the topic and her familiarity with the work of the organization. During interviews, she put stakeholders at ease with her warm, inquisitive manner, and command of the topic. She knows when to follow up for additional information, and when the interviewee is ready to move on to the next topic. I saw time and again, Sophie's attention to detail enabled her to recall an earlier statement that appeared to contradict or modify a later observation an interview subject offered. She is an attentive and active listener who also thinks analytically in the moment. This excellent situational judgment prepares Sophie to perform sophisticated legal research.

When it came time to communicate her findings in writing, Sophie impressed me with her ability to synthesize large quantities of data into a concise, well-organized, and meticulously cited memorandum. She writes quickly, clearly, and with precision of language. Sophie welcomes feedback and enjoys the intellectual give and take of working through the implications of a thorny policy issue through multiple drafts. She is intellectually curious and genuinely likes turning over an issue in conversation and through drafts. She consistently showed initiative to research new leads. Sophie struck the right balance in working independently and checking in to keep me updated and ensure she was on the right track. She is a seasoned writer and researcher beyond her years. I have no doubt she has the skills and temperament to be a successful clerk.

Sophie's approach to wrestling with legal questions also meaningfully shaped our seminar discussions, particularly during sessions at which other students presented their ongoing work for feedback. For example, when students working on a case seeking to attribute criminal misconduct of criminal gangs to the State hit a research roadblock, Sophie asked probing questions, suggested a line of cases from another international jurisdiction that could be helpful, and recommended experts whose research on organized crime could help them overcome their hurdle.

Finally, Sophie is a wonderful colleague. She takes every opportunity to contribute to the clinic's success through her dedication to the work, her humility, and her sense of humor. She received constructive feedback with grace; approached interviews with equal measures of enthusiasm and thoughtfulness; and was always ready to step up to meet unexpected scheduling changes or any number of inevitable course corrections required by working on live matters with deadlines.

Conclusion

I recommend Sophie as a clerk wholeheartedly. Her keen eye for research, her attention to detail—both in her own writing and in reviewing the work of peers—and her strength as a team player will make her an asset in your chambers. I urge you to give her application careful consideration.

Please let me know if I can provide any additional information regarding Sophie's candidacy.

Sincerely,

Laurel E. Fletcher

Laurel Fletcher - lfletcher@law.berkeley.edu - 510-643-4792

Sophie Lombardo

University of California, Berkeley, School of Law

Opening Brief on the Merits

The writing sample below is an excerpt from the final brief I submitted for my Appellate Advocacy class in Fall 2022. Based on the record for a case pending before the California Supreme Court, *Taking Offense v. State of California*, I drafted a brief and presented an oral argument on behalf of the respondent, State of California. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my professor. Where indicated, I have omitted portions of this brief for brevity.

QUESTIONS PRESENTED

[Omitted for brevity]

INTRODUCTION

For decades, senior members of the lesbian, bisexual, gay, transgender, and queer community (LGBTQ+) have foregone potentially life-saving care due to the threat of discrimination. In response, the State of California adopted Senate Bill 219, prohibiting employees of long-term care facilities from engaging in discriminatory misconduct, including by misgendering their patients. In so doing, the State sought to accomplish one thing: decrease harm to a vulnerable community.

Misgendering causes a significant injury from which LGBTQ+ residents of long-term care facilities cannot—and should not be expected to—escape. A refusal to see one of the most fundamental aspects of a person's identity is humiliating and traumatizing regardless of where it occurs. When it is inflicted in long-term care facilities, by the very people entrusted with an individual's care, that expression is no longer mere speech—it is discrimination against a captive audience. The fact that such conduct is carried out through words does not strip the State of its authority to protect the health and safety of its citizens.

The trial court upheld the misgendering provision as a content-neutral time, place, or manner restriction, but the Court of Appeal reversed, rigidly applying an inapposite standard that governs pure speech in a public forum. As a result, the lower court erroneously concluded that the State may not protect one of its most vulnerable communities from discriminatory misconduct. Contrary to the Court of Appeal's holding, S.B. 219's misgendering provision prohibits only a narrow set of words so harmful that they alter the conditions of care in a private forum. By virtue of its limited scope, it does not burden any more speech than necessary, and it is therefore not overbroad. Likewise, because of its plain text and purpose, it is not impermissibly

vague. The State is empowered to regulate as it has. To hold otherwise would not only jeopardize the lives of a community whom the State has both the right and the obligation to protect, but it would also shake the foundation upon which much of our state and federal antidiscrimination legislation stands.

The First Amendment guarantees an individual's fundamental right to expression, but it does not hand speakers a blank check to discriminate. Accordingly, the State of California respectfully requests that this Court reverse the Court of Appeal and uphold S.B. 219.

STATEMENT OF FACTS

I. California's Legislature Identified Anti-LGBTQ+ Discrimination as a Cause of Health Inequities.

For decades, California's community of LGBTQ+ seniors has suffered from serious disparities in access to basic healthcare. Numerous studies regarding these long-term challenges revealed that, as a result of "lifelong experiences of marginalization," older members of the LGBTQ+ community have a greater need for this care than their cisgender- and straight-identifying counterparts. Joint Appendix (hereinafter JA) 20. According to a survey of LGBTQ+ senior citizens in San Francisco, nearly one-third of respondents disclosed that they were in poor health; nearly half stated that they had disabilities; and one-third of all male participants reported that they had HIV/AIDS. JA 21. Another study found that 60% of participants lived alone, and only 15% had children. JA 21. Of the small percentage who were parents, only 40% reported that their children would "be available to assist them" with their daily needs. JA 21. Based upon these metrics, the Legislature found that LGBTQ+ seniors are at a "high risk for isolation, poverty, homelessness, and premature institutionalization." JA 20.

Despite the community's increased need for services, however, the Legislature also found that LGBTQ+ seniors are far less likely to access healthcare and assisted-living services than

those who do not identify as LGBTQ+. JA 21. "Even when their health, safety, and security depend on it," LGBTQ+ seniors reported that they did not feel comfortable seeking out care. JA 20. And for good reason. One in five transgender adults has been denied healthcare because of their gender identity. Nearly half have experienced discrimination in a place of public accommodation. And of the respondents who did reside in long-term care facilities, 43% reported that they had either witnessed or experienced mistreatment as a result of their LGBTQ+ status. JA 20.

These experiences have not only diminished the quality of life that LGBTQ+ residents enjoy in long-term care facilities, but they also have resulted in harmful perceptions about seeking care in the first place, perpetuating a dangerous cycle. JA 20. Faced with a choice between remaining in "the privacy of…their own home," where they do not have access to "necessary care and services," and entering a space where "they must rely on others for [that] care," many LGBTQ+ seniors have opted for the former. JA 22. According to survey results from "Stories from the Field: LGBT Older Adults in Long-Term Care Facilities," 81% percent of respondents believed that "other residents would discriminate against an LGBT elder in a long-term care facility." JA 20. An even greater share of respondents—89%—believed that staff would discriminate against LGBTQ+ residents. JA 22. And nearly 53% of all respondents believed that employees' discriminatory conduct "would rise to the level of abuse or neglect." JA 22.

II. To improve LGBTQ+ Seniors' Access to Essential Services, the Legislature Enacted the LGBT Long-Term Care Facility Residents' Bill of Rights.

[Omitted for brevity]

III. Procedural History

[Omitted for brevity]

STANDARD OF REVIEW

[Omitted for brevity]

ARGUMENT

I. Because California's Misgendering Provision Regulates Discriminatory Conduct Rather Than Speech, it Raises No First Amendment Issue.

In adopting the LGBT Long-Term Care Facility Residents' Bill of Rights, the State of California sought to eliminate invidious discrimination against one of its most vulnerable communities. Informed by studies showing the chilling effect of anti-LGBTQ+ discrimination on access to healthcare, the Legislature prohibited the most frequent and harmful misconduct that senior members of the LGBTQ+ community experience in long-term care facilities. Because it alters the conditions of care received by LGBTQ+ residents, misgendering—refusing to refer to someone by the pronouns with which they identify—was one such act. S.B. 219's misgendering provision therefore regulates discriminatory conduct rather than speech, and the Court of Appeal erred in treating it as a content-based restriction of expression. In this context, misgendering enjoys no protection under the First Amendment, intermediate scrutiny applies, and it easily survives review.

A. The Misgendering Provision is Presumptively Constitutional, and Petitioner Taking Offense Cannot Meet its Heavy Burden of Proving Conflict.

[Omitted for brevity]

B. The Misgendering Provision Regulates Misconduct; Any Burden on Speech is Incidental to That Conduct.

Where, as here, "speech" and "nonspeech" elements fall within "the same course of conduct," the Supreme Court has held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). Eliminating discrimination "and assuring…citizens equal access to publicly available goods and services," has been recognized as

a compelling interest "of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *see also North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008) (holding that the state has a compelling interest in "ensuring full and equal access to medical treatment irrespective of sexual orientation"). The mere fact that an act "express[es] a discriminatory idea or philosophy" does not therefore "shield[] [it] from regulation." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 389-90 (1992). Because "acts of invidious discrimination…produce special harms distinct from their communicative impact," courts have held that they "are entitled to no constitutional protection." *Jaycees*, 468 U.S. at 628; *see also Robinson v. Jacksonville Shipyards, Inc.* 760 F.Supp. 1486, 1535 (M.D. Fla. 1991) (holding that "pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

In enacting S.B. 219, the Legislature followed a well-worn path to regulate verbal conduct amounting to discrimination. In 1959, the State passed the Fair Housing and Employment Act (FEHA), finding that workplace discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 129 (1999) (quoting FEHA § 12920). In relevant part, FEHA banned verbal harassment on the basis of race and national origin as one form of employment discrimination, identifying "epithets, derogatory comments or slurs on a basis enumerated in the Act." *Id*. at 129 (quoting California Code of Regulations, title 2, section 7287.6, subdivision (b)(1)(A)).

In *Aguilar v. Avis Rent A Car System, Inc.*, this Court upheld an injunction prohibiting the manager of a rental car company from using derogatory racial or ethnic epithets in the

workplace. *Id*. at 150. In that case, a trial court found that Avis manager John Lawrence's "constant[]" barrage of racial epithets toward Latino drivers amounted to employment discrimination in violation of Title VII, and it issued an injunction precluding him from future verbal harassment. *Id.* at 136. This Court affirmed, holding that "use of racial epithets in the workplace does not violate the right to freedom of speech" when "the use of such epithets will contribute to the continuation of a hostile or abusive work environment" that gives rise to "employment discrimination." *Id*. at 135.

As in *Aguilar v. Avis*, courts have recognized that the creation of such a hostile environment may occur entirely through speech. In some of these cases, they have not even addressed the First Amendment implications of an antidiscrimination claim. In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that a company executive's frequent insults and "unwanted sexual innuendos" created an abusive work environment for one of the company's female employees. 510 U.S. 17, 19 (1993). There, the misconduct at issue was solely verbal in nature. Nevertheless, the Supreme Court recognized Harris's discrimination claim, observing that verbal harassment has clear tangible harms, often "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Id.* at 22. To that end, the Court unanimously held that verbal conduct could cultivate an environment reasonably and actually perceived "as hostile or abusive," even without proving the recipient had suffered a "concrete psychological harm." *Id*.

Here, the misgendering provision regulates speech that, much like the "unwanted sexual innuendos" at issue in *Harris*, cultivates a toxic environment for LGBTQ+ residents of long-term care facilities. *Id.* at 19. As the Legislature found, LGBTQ+ residents have consistently reported experiences of discrimination on the basis of sexual orientation or gender identity, including

being "abruptly discharged," subjected to "verbal or physical harassment," and misgendered by staff. JA 22. According to a 2013 survey of LGBTQ+ seniors in San Francisco, "nearly one-half of the participants…reported experiencing discrimination in the prior 12 months because of their sexual orientation or gender identity." JA 22.

C. Misgendering is Discrimination, Not Speech.

The misconduct prohibited by S.B. 219's misgendering provision amounts to discrimination for two reasons. First, intentional misgendering is humiliating and disparate treatment on the basis of sex. Second, misgendering inflicts significant, special harms within the context of long-term care facilities, impermissibly altering the conditions of care. It therefore enjoys no constitutional protection under the First Amendment. *See Jaycees*, 468 U.S. at 628.

While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," courts have rejected the notion that all such conduct enjoys First Amendment protections. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Rather, the Supreme Court has held, "expressive activities that produce special harms distinct from their communicative impact" enjoy "no constitutional protection." *Jaycees*, 468 U.S. at 628. Special harms include fighting words, which threaten the public peace; obscenity, profanity, and threats of violence. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568; *see also In re Joshua H.*, 13 Cal. App. 4th 1734, 1739, 1749 (1993) (upholding hate crime statute because it "proscribe[s] an especially egregious type of *conduct*," not the bigoted thought behind it). Discrimination has been recognized as another such harm, even when it "may be characterized as a form of exercising" one's First Amendment rights. *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973); *see also R.A.V.*, 505 U.S. at 390 ("sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

The misgendering provision prohibits "willful and repeated" misgendering when it is motivated by "a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status." Cal. Health and Safety Code § 1439.51(a)(5). An employee's refusal to use the pronouns with which a resident identifies would only violate this provision if it were animated by their disagreement with how a resident represents their gender.[1] This is discrimination on the basis of sex. *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1737 (holding that Title VII's prohibition of sex discrimination protects homosexual and transgender employees).

Second, misgendering inflicts significant harms on LGBTQ+ residents of long-term care facilities, not only violating their rights to a dignified existence and self-determination, but also impermissibly diminishing their standard of care. Because misgendering is a "verbal practice[] meant to express social inferiority, [and] exclusion," it undercuts state and federal policies requiring long-term care facilities to treat all residents with "respect and dignity." *See* Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2228 (December 2021); 42 U.S.C. § 483.10(a)-(b). When employees misgender one of their patients, they refuse to recognize "the most personal expression of one's self." *Taking Offense v. State*, 66 Cal. App. 5th 696, 732 (Robie, J., concurring). Refusing to honor another person's identity "is simply rude, insulting, and cruel." *Id*. It accomplishes nothing other than the denial of a resident's right to a "dignified

[1] If an employee takes no issue with using masculine pronouns for a resident assigned male at birth, but they refuse to use masculine pronouns for a resident assigned female at birth, "[s]ex plays a necessary and undisguisable role in the decision." They treat the second resident differently because of "traits or actions" they "would not have questioned in members of a different sex." *Bostock*, 140 S.Ct. at 1737.

existence, [and] self-determination," on the basis of a protected characteristic. 42 U.S.C. § 483.10(a)-(b); *see also Bostock,* 140 S.Ct. at 1741.

That cruelty inflicts serious and disproportionate harms on the LGBTQ+ community. As the Legislature noted, 43% of long-term care facility residents surveyed in a recent study had either witnessed or experienced mistreatment due to their gender identity or sexual orientation. JA 20. Nearly half had experienced discrimination in a place of public accommodation. JA 20. Willful misgendering falls within this broader constellation of discriminatory conduct because it threatens the "autonomy, dignity, privacy, and self-identity" of LGBTQ+ individuals. Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. at 2260. Indeed, it is one of the most pervasive harms that LGBTQ+ seniors observed in long-term care facilities. JA 20.

In *Prescott v. Rady Children's Hospital—San Diego*, the District Court for the Southern District of California likewise recognized misgendering as unlawful discrimination, the ramifications of which can be devastating. 265 F.Supp.3d 1090 (S.D. Cal. 2017). In that case, Katharine Prescott brought her transgender son Kyler to Rady Children's Hospital for treatment related to suicidal ideation and gender dysphoria. *Id.* at 1096. Upon his admission, both Kyler and his mother informed staff of "his need to be referred to exclusively with male gender pronouns." *Id*. Although Kyler's medical records "reflected his legal name and gender change…staff repeatedly addressed and referred to Kyler as a girl, using feminine pronouns." *Id.* at 1096-97. One employee even explained their refusal, stating, "Honey, I would call you 'he,' but you're such a pretty girl." *Id.* at 1097. Though Kyler's "continuing depression and suicidal thoughts" continued to concern his medical providers, they ordered him "discharged early…because of the staff's conduct." *Id.* Just one month after his discharge, Kyler died by

suicide. *Id.* After his death, the district court permitted Kyler's mother to seek damages related to the hospital's discrimination. *Id.* at 1105-06.

By the same token, courts have recognized that affirming an individual's gender identity can "provide [someone] a great deal of support." *Kluge v. Brownsburg Community Sch. Corp*., 548 F. Supp. 3d 814, 818-19 (S.D. Ind. 2021); *see also Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586, 620 (4th Cir. 2020). In such cases, "a name carries with it enough importance" that "a policy that requires staff to use transgender students' preferred names" can "overcome a public school corporation's duty to accommodate a teacher's sincerely held religious beliefs." *Kluge*, 548 F. Supp. 3d at 849.

Misgendering diminishes the quality of life and the quality of care that LGBTQ+ residents receive in long-term care facilities, the consequences of which include substantially worse health outcomes. Because S.B. 219's misgendering provision seeks only to prohibit the use of language that amounts to discrimination against LGBTQ+ residents, it should be treated as a restriction of conduct subject to intermediate scrutiny.

II. Even if the Misgendering Provision Is Reviewed as a Regulation of Speech, It is Subject to Intermediate Scrutiny Because Residents of Long-Term Care Facilities Are a Captive Audience.

Even if this Court holds that the misgendering provision regulates speech, the restrictions it imposes are constitutional because of the particular context in which they apply. In every major case implicating a restriction of expressive conduct, the Supreme Court has weighed factors such as the nature of the forum, the degree of the harm, and the captivity of the audience in its assessment of a regulation's constitutionality. *Frisby v. Schultz*, 487 U.S. 474, 479 ("To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech"); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). Because

the misgendering provision regulates only a narrow set of words directed at a captive audience in a private, residential forum, the captive audience doctrine applies. Moreover, because the misgendering provision seeks only to eliminate a particular kind of harm within long-term care facilities, it is a time, place, manner restriction subject to intermediate scrutiny. The Court of Appeal therefore erred in holding that the misgendering provision was a content-based restriction of speech.

A. LGBTQ+ Residents of Long-Term Care Facilities Are Captive Listeners.

Where, as here, the audience "has no reasonable way to escape hearing an unwelcome message," courts have recognized that "greater restrictions on a speaker's freedom of expression may be tolerated." *Aguilar*, 21 Cal. 4th at 159 (Werdegar, J., concurring). This has held true even in cases where the regulation distinguished according to content. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (1974) ("I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it") (Douglas, J., concurring); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 729 (1970) (upholding a regulation permitting mailers to remove their names from mailing lists that a given householder may find offensive). To that end, this Court has never required an audience incapable of avoiding offensive or uninvited messages to endure the indignities of dehumanizing or offensive language. *See, e.g., Aguilar*, 21 Cal. 4th 121 (Werdegar, J., concurring).

Rather, numerous decisions show that an unwilling listener's capacity to leave is "relevant and important, if not dispositive…in determining whether government restrictions on speech…are permissible under the First Amendment." *Aguilar*, 21 Cal. 4th at 162 (Werdegar, J., concurring); *see also Erzoznik v. City of Jacksonville*, 422 U.S. 205, n.6 ("It may not be the content of the speech, as much as the deliberate 'verbal (or visual assault)' that justifies

proscription") (citation omitted). Guided by this principle, the high court has upheld the rights of commuters not to be subjected to advertising campaigns; of employees not to be subjected to harassing speech; and of school students not to be subjected to a classmate's lewd presentation. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Aguilar v. Avis Rent A Car System*, 21 Cal. 4th 121, 154 (1999); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

In *Frisby v. Schultz*, for example, the Supreme Court upheld an anti-picketing ordinance under the captive audience doctrine. 487 U.S. 474. There, a Wisconsin town adopted an ordinance banning picketing "before or about" individual homes. *Id*. at 476. The Supreme Court held that when aggressive and targeted "picketing is narrowly directed at the household, not the public," residents are "figuratively, and perhaps literally, trapped within the home." *Id*. at 487. "Because of the unique and subtle impact of such picketing," residents would be "left with no means of avoiding the unwanted speech." *Id*.

Likewise, in *Madsen v. Women's Health Center, Inc.*, the Supreme Court recognized that patients entering medical facilities are a captive audience. 512 U.S. 753 (1994). Upholding an ordinance prohibiting certain picketing activities within 100 feet of healthcare facilities, the Court observed that "picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." *Id*. at 768. Recognizing that hospitals are spaces "where patients and relatives alike often are under emotional strain and worry," and where "pleasing and comforting patients are principal facets of the day's activity," the Court held that "the First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id.* at 772-73.

Even more so than captive streetcar commuters, many LGBTQ+ seniors find themselves in long-term care facilities "as a matter of necessity, not of choice." *See Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952). LGBTQ+ senior citizens are far less likely to benefit from external familial or social support than non-LGBTQ+ seniors, a direct consequence of their "lifelong experiences of marginalization." JA 20. Absent such social or financial support, they have less freedom to lean on private caretakers, and consequently, they have far less choice in where they live as they age. JA 21. A long-term care facility may be their only option. Moreover, recognizing that many LGBTQ+ seniors are infirm, they may have difficulty physically removing themselves from any given space without the assistance of others. JA 21 (finding that nearly half of LGBTQ+ residents in a San Francisco survey have disabilities).

As a result, LGBTQ+ residents of long-term care facilities are, much like the patients in *Madsen* and the residents in *Frisby*, "left with no means of avoiding…unwanted speech." *Frisby*, 487 U.S. at 487. Should an employee charged with their care insist upon misgendering, they may not have the physical, financial, or logistical means to "escape hearing [that] unwelcome message." *Aguilar*, 21 Cal. 4th at 159 (Werdegar, J., concurring). Given that some of the "principal facets" of a long-term care facility's daily functions are, similarly to hospitals, "pleasing and comforting patients" who may be under significant "emotional strain," their inability to avoid discriminatory speech is particularly significant. *See Madsen*, 512 U.S. at 772-73. To that end, residents are a captive audience, and they have a substantial interest in not being compelled to listen to discriminatory speech. *See Pub. Util. Comm'n v. Pollak*, 343 U.S. at 468.

B. Because the Misgendering Provision Applies Only Within Long-Term Care Facilities, It Is a Time, Place, or Manner Restriction.

[Omitted for brevity]

C. The Court of Appeal Erred in Treating the Misgendering Provision As a Content-Based Restriction of Speech.

[Omitted for brevity]

III. While the Misgendering Provision Survives Any Tier of Scrutiny, Intermediate Scrutiny Applies.

[Omitted for brevity]

A. The State of California Has a Compelling Interest in Eradicating Discrimination Against Its LGBTQ+ Residents

[Omitted for brevity]

B. The Misgendering Provision is Narrowly Tailored to Advance That Compelling Interest.

[Omitted for brevity]

IV. The Misgendering Provision is Neither Void for Vagueness, Nor Impermissibly Overbroad.

[Omitted for brevity]

CONCLUSION

[Omitted for brevity]

Applicant Details

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Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Latinx Law Students Association Asylum and Refugee Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

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June 12, 2023

The Honorable Leslie Abrams Gardner
Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

Dear Judge Abrams Gardner,

I am a rising third-year student, Diversity, Equity & Inclusion Chair of the *Columbia Law Review*, and President of Empowering Women of Color at Columbia Law School. I write to apply for a clerkship in your chambers in 2024 or any subsequent term.

As a Max Berger '71 Public Interest/Public Service Fellow, I plan on pursuing a career in public defense and am eager to clerk to become a better advocate. By the time I clerk, I will have worked in three different public defender offices - Mecklenburg County Public Defender's Office in Charlotte, North Carolina, the Neighborhood Defender Services of Harlem (through Columbia's Criminal Defense Clinic), and the Bronx Defenders. In each office, I have gained extensive experience doing legal research, learning about the adjudicatory process, and how to best advocate for clients. While most of my legal experiences have been in the criminal realm, I am also eager to explore civil rights litigation as it pertains to aiding those criminalized by the state through §1983 claims for instance.

At Columbia, I have honed my writing skills by working as a competitor for the LaLSA Asylum and Refugee Moot Court team and as a staffer on the *Columbia Law Review*, specifically through the note writing process. I look forward to applying these skills in a clerkship position and improving my writing through guidance from your Honor and fellow co-clerks.

Enclosed please find a resume, transcript, and writing sample. Following separately are letters of recommendation from Professor Jeffrey Fagan (jaf45@columbia.edu), Professor Katherine Franke (kranke@law.columbia.edu), and Professor Amber Baylor (aab51@columbia.edu).

Thank you for your consideration. Please do not hesitate to reach out if you need any additional information. Looking forward to hearing from you.

Respectfully,

Erika Lopez

Erika Lopez

ERIKA LOPEZ

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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. Candidate, Expected May 2024
Honors: Public Interest/Public Service Fellow
Columbia Law Review - Diversity, Equity, and Inclusion Appointed Editor
Activities: Empowering Women of Color (President), Suspension Representation Project, Latinx Law Students Association, Black Law Students Association

YALE UNIVERSITY, New Haven, CT
B.A. in Psychology with Distinction, May 2019
Awards: 1st Place $5,000 Recipient of Class of 1971 Summer Science Research Fellowship in 2017
Senior Project: *Reject Free Will to Reform the Criminal Justice System*

EXPERIENCE

THE BRONX DEFENDERS - CRIMINAL DEFENSE PRACTICE Bronx, NY
Student Attorney May 2023 – Aug. 2023

COLUMBIA LAW CRIMINAL DEFENSE CLINIC New York, NY
Student Attorney Sept. 2022 – Dec. 2022
Represented two clients with misdemeanor cases in New York County Criminal Court under the supervision of Professor Amber Baylor and Brent Low of the Neighborhood Defender Services of Harlem. Interviewed clients, conducted an investigation, and appeared on the record. Obtained two favorable outcomes, including a dismissal.

MECKLENBURG COUNTY PUBLIC DEFENDER'S OFFICE Charlotte, NC
Legal Intern May 2022 – Aug. 2022
Honed holistic defense skills working directly with clients, their loved ones, social workers, mental health providers and counsel on release plans. Wrote motions and memoranda in support of clients' defenses. Helped prospective clients apply for a public defender during first appearances. Interviewed clients for bond hearings.

SHER TREMONTE LLP New York, NY
Paralegal Jun. 2021 – Aug. 2021
Assisted attorneys on a three-week federal criminal trial for an indigent client. Reviewed discovery material and aided with trial strategy. Acquittal secured on federal murder charge.

U.S. ATTORNEY'S OFFICE, D. CONN. New Haven, CT
Reentry Intern Sept. 2018 – May 2019
Collaborated with Reentry & Community Outreach Coordinator on efforts to help those who had been recently released or were about to be released from state and federal prisons assimilate back into their communities. Brainstormed creative solutions to problems clients faced, took notes during meetings, edited resumes, and assisted with other aspects of the job application process and housing search.

LANGUAGE SKILLS: Spanish (Fluent), Portuguese (Intermediate)

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Erika C Lopez

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
P8425-1	Gun Violence In The Us: E		3.0	A
L9175-2	S. Trial Practice	Gregory, Naima; Zien, Marnie	3.0	A-
L6683-1	Supervised Research Paper	Fagan, Jeffrey A.	1.0	A-
L6822-1	Teaching Fellows	Franke, Katherine M.	3.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9244-1	Criminal Defense Clinic [Minor Writing Credit - Earned]	Baylor, Amber	3.0	A
L9244-2	Criminal Defense Clinic - Project Work	Baylor, Amber	4.0	A
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6675-1	Major Writing Credit	Fagan, Jeffrey A.	0.0	CR
L6683-1	Supervised Research Paper	Fagan, Jeffrey A.	2.0	A-

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B+
L6108-3	Criminal Law	Rakoff, Jed	3.0	B
L6173-1	Critical Legal Thought	Franke, Katherine M.	3.0	A-
L6862-1	Lalsa Moot Court	Rodriguez, Alberto	0.0	CR
L6121-35	Legal Practice Workshop II	Rodriguez, Alberto	1.0	P
L6116-3	Property	Heller, Michael A.	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-4	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Johnson, Olatunde C.A.	4.0	B+
L6105-6	Contracts	Morrison, Edward R.	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-22	Legal Practice Workshop I	Ehrlich, Stephen; Rieke, Lena	2.0	P
L6118-2	Torts	Merrill, Thomas W.	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 57.0

Total Earned JD Program Points: 57.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0

Columbia
Law School

Amber Baylor
Clinical Professor of Law
Director, Criminal Defense Clinic

435 West 116th Street
New York, NY 10027

abaylor@law.columbia.edu

Dear Judge:

I am writing to enthusiastically recommend Erika Lopez for a judicial clerkship. Erika is a shining example of leadership, commitment, and thoughtfulness. I came to know Erika well as her professor in the Columbia Law School Criminal Defense Clinic. I taught her in a seminar and supervised her fieldwork. I am certain that she will be an excellent clerk, in large part due to her engagement, resilience and outstanding diligence.

Engagement

I worked with Erika in the Criminal Defense Clinic. There she represented two individuals in misdemeanor matters as defense counsel and worked on a team as policy counsel for a local, grassroots organization. Erika was one of only two 2Ls among a majority of 3L students. The year of difference can be significant. Third -year students have had a longer period of time to engage related theory, litigation skills courses, and more experience as legal interns and are engaged in their career search. Erika stood out among the entire class for her high level of engagement. Often, Erika was the student who started our conversations in the seminar, tying theoretical readings into her thoughtful contemplation about the realities of defense practice.

In seminar and in class, Erika was always very present. She is a joy to teach. I met with her weekly for supervision meetings in addition to the twice-weekly clinic seminar. She brought inquisitiveness, humor and energy to our course discussions. Erika was excited to take on the opportunities in the clinic. Erika did not shortcut any aspect of the rigorous course. She dived into discussion prompts, prepared carefully for in-class exercises, and was thorough in her case memoranda. She sought out feedback. I found that Erika revised her work even when not required. Erika clearly wants to be a skilled attorney, and that, seems to be the source of her self-motivation. While many students represented one individual client throughout the semester, Erika volunteered for the opportunity to work with two people. She was an excellent advocate on both of their matters.

On one occasion, another clinical professor at CLS joined Erika and me in a conversation about one of her client's misdemeanor cases. The professor commented later on how struck she was by Erika's excellent level of organization, her care regarding her client's matter, how thoroughly she worked up options for her client and the detail with which she planned her next counseling session.

Resilience

I have also had the chance to see Erika respond to obstacles and unexpected matters in her work. She does not shy away from a challenge. The unexpected complexities that arose in her cases would have been overwhelming to many students. Instead, Erika proactively scheduled time to meet to discuss how she might move forward. She arrived to our meetings with a plan, supported by a legal theory of the case, and talked about taking on daunting tasks.

Erika's ability to measure and take on new challenges will serve her well in a clerkship. She seeks out feedback proactively, but arrives prepared and with a realistic plan to execute.

Diligence

Finally, Erika is diligent in her completion of projects. In my work with her, she was tireless in refining her advocacy to remarkable results. She followed up, insuring that the details of her resolution for her clients' matters were observed by the court. By the end of the semester, her oral advocacy was persuasive, leaving the impression that she was a seasoned professional. Because she had two individual clients, Erika also signed on to do additional research and writing. Even after the semester and her responsibilities ended, Erika continued to check in to make sure all of her clients' needs were resolved. I have confidence in her ability to deliver at the highest level of performance.

Erika is an incredibly valuable member of the Columbia Law School community. I recommend her with confidence for a judicial clerkship.

Please feel free to contact me with any inquiries regarding Erika and her preparation for this position. I can be reached at abaylor@law.columbia.edu.

Sincerely,

Amber Baylor

Columbia Law School

June 03, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Re: ***Recommendation for Erika Lopez***

Dear Judge Gardner:

Erika Lopez has applied for a clerkship in your court, and it is a pleasure to enthusiastically and unconditionally recommend her. Over the past year, I worked closely with Erika on her note for the Columbia Law Review. Through our discussions and meetings, I have seen her deep commitment both to rigorous scholarship and practice on criminal law and civil rights. She has devoted considerable effort throughout her two years at Columbia to research on these issues, both in coursework and a range of externships in the hot house environments of criminal defense practice and prosecution offices. She has coupled those commitments with work on gender discrimination and gender violence, an intersectional analysis that was both innovative and reflective of the depths of her unique intelligence. Her note is a timely (given the 2022 Bruen opinion) analysis of the intersection of two of these foci: the effects of discrimination in policing and prosecution that denies non-white citizens their Second Amendment rights. We worked closely at each stage of the development of her note, through which I was able to understand her intelligence and commitments to law and justice.

Erika's note was incubated in the aftermath of the 2020 crisis over race and policing across the U.S. She begins with the exclusion of persons convicted of both felony and misdemeanor crimes from access to firearms via licensing. She begins with the assumption that many of these convictions result from racial discrimination in policing, a position that has been established in a substantial body of recent empirical work and noted in caselaw. Both drug enforcement and proactive policing models focusing on illegal gun possession were implicated in these patterns that result in a racial disproportionality in convictions. The result was the exclusion of persons convicted under those practices were ineligible for licensing for carry permits and more broadly, firearm ownership. The denial of Second Amendment rights resulting from these policing and charging practices was the focus of her scholarship. Her argument was challenging, if not risky, but an enlightened risk given the core principles of the new jurisprudence of the Second Amendment.

In working with Erika, I saw a creative yet disciplined legal analyst with a deep set of tools ranging from doctrinal and statutory analyses to a mastery of the empirical literature. I have enjoyed working with her, and have taken some pride in watching at close range her development into a legal scholar and analyst. Throughout her law school career, she has deepened these commitments and skills through her placements in the real work of attorneys on both sides of the law.

Erika is now seeking a clerkship in a District Court to build upon the work she has done both in her training and in the agencies. She would be an outstanding clerk. Her grades are very strong. Her quality of mind also is unique and passionate, best illustrated in her weaving of doctrine and the rigors of empirical research and social theory in her scholarship. Her experiences in internships and fellowships have made a lasting impression on her, fostering a maturity well beyond that of most recent law school graduates. Her legal skills have been enriched if not leavened by her internships in non-profit institutions in indigent defense and civil rights.

All told, Erika has a rich skillset that has prepared her well for a challenging clerkship. And she is a pleasure to work with, both conscientious and enthusiastic in her commitments to law. She is one of the most unique students I have supervised. Both her intellectual capital and her productivity in law school and beyond place her in the top 10 percent of students whom I have taught. Working with her hands on in scholarship has been a special pleasure, which hopefully you will see for yourself. Once again, she has my most enthusiastic recommendation for a clerkship in your court.

Please do not hesitate to contact me should you need additional perspectives on Erika's trajectory and her potential for substantial and significant contributions to your court.

Yours truly,

Jeffrey Fagan
Isidor and Seville Sulzbacher Professor of Law, Columbia University
Professor of Epidemiology, Mailman School of Public Health, Columbia University
Senior Research Scholar, Yale Law School

Jeffrey Fagan - jeffrey.fagan@law.columbia.edu - 212-854-2624

June 02, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write to offer my strongest support for Erika Lopez's application to serve as a clerk in your chambers. Erika is among the strongest all-around students I have encountered at Columbia Law School and I have no doubt that she will make an excellent judicial clerk.

Erika took a class with me in the spring of her first year of law school and she distinguished herself as one of the top two students in the class. She spoke frequently in class, raising ways of seeing the material that were original, sophisticated, and deeply insightful. She showed the kind of quality of mind made up of sharp analytic rigor, an ability to question underlying presumptions, and an appreciation for the deep structure of legal rules.

I was so impressed with Erika that I asked her to serve as my teaching assistant for the next year. As my TA this spring she showed herself to be a true leader and mentor with our students. She developed new ways to present the class material that responded to the students' queries, and was always available to them for guidance and support.

One thing I will note, as you can see from Erika's CV and transcript, she did not excel academically in her first year. But you will also note that her grades from this spring show real academic achievement. I've seen this with a number of students with whom I have worked – it takes them a couple semesters to metabolize what it is we are asking them to do in law school. Erika is that kind of student. She is clearly very smart, and her true abilities are in evidence in her second-year grades. What this shows is a kind of nimble intelligence that can adapt to different contexts and expectations.

Working closely with Erika, I have come to know her as a wonderfully caring person, stepping up and in where needed, and lifting up the work of everyone on the team. She is dedicated to a career in criminal law and would benefit enormously from a judicial clerkship. I offer her my highest recommendation to serve in your chambers.

Sincerely,

Katherine Franke

Katherine Franke - kfranke@law.columbia.edu - 212-854-0167

ERIKA LOPEZ
Columbia Law School J.D. '24
347-260-3382
ecl2174@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is a brief written during my first year of law school for the Latinx Law Students Asylum and Refugee Law Moot Court Team from the perspective of the Government. This sample was lightly edited by second year members of the team. The statement of the case, summary of argument, standard of review, table of contents, and appendix have been omitted. This case takes place in an imaginary jurisdiction, so this brief contains citations to a fictitious circuit court.

This brief is written for Respondent, Nur Khat, a native of Shikor, who unlawfully entered the United States in 2008. Growing up, Respondent became fascinated with making depictions of men in subservient ways in public, despite the Shikorian people's conservative ideologies about gender roles. He claims that his public displays of artwork led him to fear for his safety, which prompted him to enter the United States without authorization. However, when he entered the United States, rather than affirmatively applying for asylum, Respondent began using a false social security number (SSN) to illegally obtain employment as a mason. In the U.S., Respondent no longer practiced art professionally and instead pursued it as a hobby. Respondent developed a small artistic following, drawing the attention of his neighbors, who eventually notified the U.S. Immigration and Customs and Enforcement (ICE). Respondent was convicted of a felony under 42 U.S.C. § 408(a)(7)(B), after which the Department of Homeland Security filed a suit to remove him. Respondent filed for asylum per 8 U.S.C. § 1101(a)(42)(A), alleging that he feared persecution on account of a particular social group, "artists subject to violence for their art."

The brief answers whether the lower court erred in finding that Respondent's claimed group, "artists subject to violence for their art," is a cognizable particular social group under 8 U.S.C. 1101(a)(42)(a) when the group does not share a common immutable characteristic, is not defined with particularity, and is not socially distinct within Shikorian society.

ARGUMENT

Respondent's claimed group "artists who are subject to violence for their art," is not a cognizable particulary social group because it does not meet the immutable characteristic requirement, is not defined with particularity, and is not socially distinct within Shikorian society.

The Respondent does not have a cognizable particular social group. An applicant that seeks asylum based on membership in a particular social group must show that the group shares a common immutable characteristic, that the group is defined with particularity, and that the group is socially distinct within the society in question. *Matter of M- E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014). If the Respondent's claimed group fails to meet any of the three aforementioned requirements, then he is ineligible for asylum based on membership in a particular social group. In this case, the Respondent, Nur Khat, fails to meet all three of the requirements. Thus, this Court should reverse the lower court's findings and uphold the finding of the Board of Immigration Appeals (BIA) that the Respondent's claimed group of "artists who are subject to violence for their art" is not a cognizable particular social group under 8 U.S.C. § 1101(a)(42)(a). Under the Immigration and Nationality Act ("INA"), whether a claimed group qualifies as a particular social group is a question of law. *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1290 (11th Cir. 2014). Legal conclusions are reviewed de novo. *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020).

A. Respondent's claimed group does not share a common immutable characteristic because he was able to change his profession.

The Respondent has failed to show that his claimed group, "artists subject to violence for their art," satisfies the common immutable characteristic required for a cognizable particular social group because he can avoid negative reactions by pursuing his art as a hobby rather than as a profession or even by changing the type of art he makes. According to the BIA, an immutable characteristic is defined as one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212 (BIA 2014) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

I. Members of Respondent's claimed group can change the shared characteristic, so it is not immutable.

1. Respondent can change his profession as an artist to deter potential violence so his profession is not an immutable characteristic.

The Respondent can change his profession as an artist to avoid potential aggression from people in Shikor, so he does not meet the immutable characteristic requirement of a particular social group. Courts have previously held that if an asylum seeker can change professions to avoid harm in their societies, then the characteristic of having a certain profession is not immutable. For example, in *Matter of Acosta*, the BIA did not find that the claimed social group of members of a taxi driver cooperative in El Salvador met the immutable characteristic requirement because the members could avoid the alleged harm by changing professions. 19 I. & N. Dec. 211, 233 (BIA 1985). In his home country, the Respondent pursued art as a profession. Merriam Webster defines "profession" as "a calling requiring specialized knowledge and often long and intensive academic preparation." The Respondent practiced his art intensively for many years and was considered to have "artistic acumen" in line with this definition of a professional. R. at 1. The Respondent's case is similar to *Acosta* because if he were to change professions, then the Papia, a distinct portion of the Shikorian population, who maintain their own cultural practices and are the only Shikorians who have attacked the Respondent, would no longer be able to recognize him and subject him to violence. R. at 1. The Respondent may contend that his case is more analogous to *Plancarte v. Garland*, in which the Ninth Circuit held that the petitioners' claimed group of "female nurses" shared the immutable characteristic of "professional nursing skills." In this case, because the nurses were being sought out by the cartel for these particular nursing skills, even if the nurses were to change professions, they would always be identified by their medical knowledge and nursing skills and, therefore, were still in danger. 9 F.4th 1146, 1151 (9th Cir. 2021). However, there is no evidence to suggest that the Respondent has become so well known in his home country as an artist that he would continue to be in danger after leaving the profession, unlike the nurses in *Plancarte.* Because the Respondent can pursue another career to avoid the asserted harm, his claimed group does not have an immutable characteristic.

2. Respondent can change the type of art he is making to avoid potential violence, so the art itself is also not an immutable characteristic.

The Respondent fails to demonstrate why he cannot change the kind of art he is making so that he will no longer be targeted. In *Acosta*, the BIA found that the taxi drivers could avoid violence by complying with the guerrilla-sponsored work stoppages, so they did not share an immutable characteristic. 19 I&N Dec. 211, 234 (BIA 1985). Similarly to the taxi drivers' modifying their behavior, the Respondent can modify the kind of art he is making to avoid future harm. The Respondent has been making art that depicts men in subservient ways and women in empowering ways, which has angered the Papia. The Respondent is well aware that the Papia take offense to and act particularly aggressively towards depictions of subservient men. R. at 1. Therefore, if the Respondent chooses to continue making his artwork public, then he can make any other form of art besides a style that depicts men in the aforementioned manner to avoid violence. Additionally, while the lower court and Respondent claim that his artistic abilities were developed from an early age and are highly specialized like the skills of the nurses in *Plancarte*, this argument does not have merit because the respondent can still modify how he uses his artistic skills. Just because the Respondent specializes in making art that depicts men in subservience does not mean that this is the only type of art he can make. If the Respondent does not want to give up making art that depicts men in subservient ways, he could even continue to do so privately.

3. Respondent should be required to change his profession because it is not fundamental to his identity or conscience.

It would be proper for this Court to hold that the Respondent can change his profession since it is not fundamental to the Respondent's identity or conscience. There have been several cases that have examined what constitutes something that is "fundamental to identity or conscience." Frequently, "fundamental" has been found to mean "innate." For example, *Hernandez-Montiel v. INS* held that gay men with female sexual identities in Mexico shared an immutable characteristic that was so fundamental to their identities that they should not be required to change.225 F.3d 1084, 1088 (9th Cir. 2000). Apart from gender expression and sexual orientation, courts outside of the immigration context have found one's hair, which can be associated with one's racial group, to be an immutable characteristic because it is so fundamental to one's identity that it should not be required to be changed. Nicholas Serafin, *In defense of immutability*, SSRN Electronic Journal (2019). See also *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981). 167. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002). The Respondent's claimed group, "artists

subject to violence for their art" does not share an immutable characteristic that is fundamental to the Respondent's sexual orientation, gender, or racial expression like the cases cited above because being an artist is not an innate trait.

While the Respondent argues that the way he currently makes art is "his only outlet in expressing himself, his values, and his soul," this cannot be true since he was able to change his profession in the United States and make his art only as a hobby. In the U.S., the Respondent worked as a mason in the construction industry for several years. R. at 1. He may argue that because he continued to use his artistic skills while working as a mason that he never really gave up his profession as an artist. However, from the record, it is clear that in the U.S. the Respondent only practiced painting in his free time. R. at 1. Therefore, the Respondent's profession is not so fundamental to him that it should not be required to change. While it is not ideal for someone to have to change professions, it is internationally accepted that being a refugee does not guarantee being able to choose professions. A. Grahl-Madsen, *The Status of Refugees in International Law* §§ 76, 77, at 173, 175, 181 (1966); *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985).

B. Respondent's claimed group is not defined with particularity.

Respondent's claimed group, "artists subject to violence for their art," is not defined with particularity because it is not only impermissibly circularly defined, but it is also overbroad. The claimed group is impermissibly circularly defined by the harm the group is allegedly subjected to and is overbroad because it has no clear limitations.

1. Respondent's claimed group is impermissibly circularly defined.

Respondent's claimed group, "artists who are subject to violence for their art," is impermissibly circularly defined because, as the BIA in the decision below pointed out, it is defined by the violence that the group is allegedly subjected to and fails to set forth any other limiting standards for the group. R. at 2. A particular social group cannot be defined circularly by persecution that its members face. Matter of A-B-, 27 I. & N. Dec. 316, 334 (A.G. 2018). For example, in *Del Carmen Amaya-De Sicaran v. Barr*, the Court held that "'married El Salvadoran women in a controlling and abusive domestic relationship'—is a clear example of impermissibly defining the group by the underlying persecution." 979 F.3d 210, 218 (4th Cir. 2020). Instead, to be defined with particularity, group members must share a narrowing characteristic other than their

risk of persecution. *Reshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005).* Although courts have found that the risk of persecution can be a relevant factor in considering a claimed group's visibility in society, it cannot be defined exclusively by the fact that members have been subjected to harm in the past. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). Therefore, it may be possible for the Respondent to raise the fact that he has experienced an attack on his art that is potentially similar to that of another artist, but this would not be sufficient evidence of the group's particularity. R. at 1. The Respondent has established three characteristics of his claimed group, (1) artists, (2) subject to violence, (3) for their art. R. at 5. The second characteristic, "subject to violence," is significant to the group's current definition. Without it, this Court is left with the vague terms, "artists" and "art" that do not constitute particularity. This is further evidence that the claimed group is circularly defined by the violence the Respondent has faced.

2. Respondent's claimed group is too overbroad.

Even if this Court overlooked the circular definition of the Respondent's claimed group, the Respondent would fail the particularity requirement because the group is too overbroad. A group is defined with particularity when it is "discrete," has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective." *Alvarado v. U.S. Att'y Gen.*, 984 F.3d 982, 989 (11th Cir. 2020). As Judge Sarkis's dissent from the Fourteenth Circuit Court points out, "the proposed group of 'artists' is amorphous and enlarges into a catchall for all persons alleging persecution who do not fit into the other four categories" of race, religion, nationality or political opinion. R. at 9. Importantly, as the U.S. Department of Justice's *Immigration Law Advisor* noted, there have not been any reported decisions of artists successfully arguing that they feared persecution on account of being a member of a particular social group of "artists." Adam Fleming, Portraits of Persecution: Analyzing Asylum Claims Filed by Artists Immigration Law Advisor, https://www.justice.gov/eoir/file/800866/download (last visited Jan. 12, 2022). This is not a surprise given that Respondent's claimed group of "artists" is an overbroad category. There are many different ways for someone to be an artist. According to Merriam-Webster's dictionary, an "artist" is simply a "person who creates art" and "art" has multiple definitions. "Artist." Merriam Webster. One especially broad definition of "art" is an "occupation requiring knowledge or skill." Id. Even the most favorable Merriam-Webster definition for the Respondent, "the conscious use of skill and creative imagination especially in the production of aesthetic

objects," still is over-encompassing in the kinds of artists it would include. Id. Nothing from the record suggests that the "artists" in the Respondent's claimed group are limited to painters, or even visual artists. Therefore, the group could also potentially include musicians, dancers, and even actors. While the Respondent might try to counter that he is referring to other visual artists like himself, this should have been made explicit when he asserted his claimed group.

The Respondent's claimed group is overbroad because it has no clear boundaries, which is problematic in that it might allow too many people to be granted asylum. Judge Sarkis's dissent noted that "artists subject to violence for their art" could include people of any age, sex, or background. R. at 9. If too many people could potentially fall into the Respondent's claimed group, then this would be counter to the important policy goal of only allowing asylum seekers into the U.S. who meet the particular social group requirements. To overcome this argument, the Respondent may point out that the U.S. has other safeguards in its immigration system to prevent a deluge of asylum applications based on particular social groups. But, it is more efficient to filter out non-meritorious claims like the Respondent's early in the process. After all, the U.S. has limited resources and thus has a strong interest in only granting asylum in extremely specific instances, so as to best provide for people truly in need of protection from persecution.

The Respondent might also try to argue that his claimed group does meet the particularity requirement because it is not just "artists," but rather "artists *subject to violence for their art*," and that this qualifier, albeit circular, adds specificity. Courts have held that there is no minimum requirement for size of a particular social group. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014). Therefore, the Respondent may contend that he and the other artist, who had rocks and food thrown at him when protecting his mural, constitute the claimed group. R. at 1. However, the record is silent on what sort of mural the other artist was making when he was attacked. Random acts of violence can and do occur. If the other artist was also making art that depicted men in subservient ways, why was that crucial detail omitted from the record when it would have strengthened the Respondent's argument? Because there is no evidence to suggest that the harm the other artist experienced was related to artwork depicting men in subservient positions, the Respondent fails to establish a claimed group with particularity.

C. Respondent's claimed group is not socially distinct within Shikorian society.

Respondent does not meet the social distinction requirement for a particular social group because people in Shikor do not recognize his claimed group and even though some people have targeted the Respondent, there is no evidence to suggest that it is the society as a whole that perceives his claimed group.

1. Respondent fails to meet the social distinction requirement because by claiming a group that is overbroad and that does not share immutable characteristics, he offers no evidence that Shikorian society recognizes his claimed group.

The Respondent's claimed group, "artists who are subject to violence for their art," fails to meet the social distinction requirement necessary for a particular social group. To meet the requirements for social distinction, a particular social group needs to meet the immutability prong and society in general must perceive someone to be part of the claimed group. *See Villegas Sanchez v. Garland*, 990 F.3d 1173, 1181 (9th Cir. 2021). The BIA makes determinations on whether a group is socially distinct on a case-by-case and society-by-society basis. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1080 (9th Cir. 2014). In other words, just because one group has been found to be cognizable in one country does not necessarily mean that it will be found to have met the social distinction requirement in another. For example, the Ninth Circuit has found that even in instances where the same international gang is found to constitute a cognizable particular social group, the gang might not be socially distinct enough in another country because of the different ways that countries deal with gang-related violence. *Id.* For this reason, it is imperative that this Court carefully consider the factual record when making a determination about the Respondent's claimed group.

Thus far, the three requirements necessary for finding a cognizable particular social group have been considered individually. However, the immutability, particularity, and social distinction requirements do not operate completely independently. Because the Respondent has failed on the immutable characteristic prong and the particularity prong, his argument for social distinction is also in jeopardy. "Artists," like the Respondent, can change professions to avoid the asserted harm, so they cannot be easily recognized by Shikorian society. Importantly, the record mentions that the Papia, the minority group that damaged the Respondent's artwork, did not physically harm or directly threaten the Respondent. R. at 1. This suggests that the Respondent's claimed group is not socially distinct enough since *he* is not being persecuted for his art. The

Papia have not singled him out, nor is there a pattern of the Papia singling out similarly-situated artists, but rather the Papia just take offense to any art that depicts men in subservient ways.

2. Respondent does not provide evidence that Shikor as a whole views his claimed group as socially distinct.

Despite providing limited evidence that the Papia might view the Respondent's claimed group as socially distinct, the Respondent has failed to demonstrate that the Shikorian society in *general* views "artists subject to violence for their art" as distinct and recognizable. For example, in *Villegas Sanchez v. Garland*, the Court held that "Salvadoran women who refuse to be girlfriends of MS gang members" was not socially distinct because apart from Villega Sanchez's own testimony, there was no corroborating evidence that anyone else perceived her claimed group. *See* 990 F.3d 1173, 1181 (9th Cir. 2021).When determining social distinction, courts have looked at the perception of the society in question as opposed to just that of the persecutors. *See* Matter of W-G-R-, 26 I. & N. Dec. at 217. *See also* Conde Quevedo v. Barr, 947 F.3d 1238, 1242 (9th Cir. 2020). Courts certainly take the perception of persecutors into account but have emphasized that their perception of a claimed group alone is not sufficient for determining that the group is socially distinct. *See Matter of M-E-V-G-*, 26 I&N Dec. at 242. *Matter of M-E-V-*G contains the origin of the term "social distinction," which evolved from the earlier term "social visibility." In that case, the respondent claimed to be part of a group of "Honduran youth who ha[d] been actively recruited by gangs but who have refused to join because they oppose the gangs." *Id.* The case dropped the term "visibility" for "distinction" because it found that groups could be perceived based on non-physical factors such as their members' political or religious beliefs. In the Respondent's case at issue, it is true that Shikorian society in general is known for being conservative about its depictions of men and women. R. at 1. However, there is no evidence to suggest that Shikor, as a country, specifically targets artists like the Respondent, who make art that depicts men in subservient ways. R. at 1.

The Respondent may try to argue that in the Duzza region, where he lives, depictions of men in subservience are strongly denounced and that this is evidence that people in Duzza perceive him as socially distinct. R. at 1. He may claim that people in Duzza recognize him for his countercultural art. But there is a difference between denouncing a practice and singling out people who partake in the practice and attacking

them for it. The former behavior, denouncing a practice, does not involve actual harm. In general, people in the Duzza region are not attacking the Respondent's art; they are merely denouncing it. The Papia, a minority population in Duzza, are the only ones who have actually attacked the respondent's art. R. at 1. If there is any argument to be made for social distinction, it is that the *Papia* have identified the respondent's claimed group as socially distinct. Although even this argument is precarious because there are no facts demonstrating that the Papia perceive the Respondent differently from other artists. After all, the record is not clear about what kind of mural the other artist whose work was targeted had made.

The Respondent might also contend that actually Shikorian society in general does view his claimed group as socially distinct because, since he has left Shikor, the Papia have grown into a "large segment of the country's population" and have obtained "powerful" leadership positions. R. at 1. However, to the first of the Respondent's points about the Papia growing in size to constitute a "large segment of the country's population," it is unclear what would be considered "large." The record does not state that the Papia are now in the country's majority. What percentage of the population do the Papia now make up? This is important because as long as the Papia are not the majority group, then their views are unlikely to dominate Shikorian society generally. This Court, in following with case law, should only be concerned with Shikorian society as a whole when deciding whether the socially distinction requirement is met. And second, even if by obtaining "powerful" leadership positions the Papia are in a better position to influence the Shikorian society's views on depictions of men in subservience, it does not necessarily mean that they will be successful in doing so. How many instances throughout history have powerful governments been ignored or even toppled by citizens who rejected state-sponsored propaganda being espoused that the citizens disagreed with? Too many to count. Therefore, even if the Papia are now in more leadership positions than before, it does not change the fact that this Court must consider how Shikorian society as a whole views the Respondent's claimed group. From the record, Shikorian society has not passed any laws punishing depictions of men in subservient positions. R. at 1. Since the respondent has left Shikor, there has been no evidence that the society at large perceives "artists" to be socially distinct, so the Respondent has failed to prove this third requirement of cognizable particular social group.

CONCLUSION

The Court should reverse the Fourteenth Circuit Court's findings and affirm the BIA's findings that the Respondent's claimed group, "artists subject to violence for their art," is not a cognizable particular social group under 8 U.S.C. 1101(a)(42)(a). The Respondent's claimed group does not share an immutable characteristic because the respondent can change his profession from artist to anything else to avoid the asserted harm. He could change the kind of art he is making or continue making the art depicting men in subservient ways but in private, rather than in public. It would not be unfair for a Court to find that the respondent should be required to change professions to avoid violence in his home country. Second, the Respondent's claimed group is not defined with particularity because it is impermissibly circularly defined by the harm that its members allegedly experience and is too overbroad. There are too many people who could fall into the category of "artists." Finally, the respondent's claimed group is not socially distinct because people in Shikor do not perceive the group or easily recognize it. While it is clear that the Respondent has failed to provide sufficient evidence to meet any of the three requirements necessary for finding a cognizable particular social group, it is important to highlight that if the Court finds that any one of the requirements is not satisfied, then the Respondent has failed to meet his burden.

Applicant Details

First Name	**Glenn**
Last Name	**Lutzky**
Citizenship Status	**U. S. Citizen**
Email Address	**glenn.lutzky@live.law.cuny.edu**
Address	**Address** **Street** **116 E 117th St Apt 2S** **City** **New York** **State/Territory** **New York** **Zip** **10035** **Country** **United States**
Contact Phone Number	**9149603250**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2012**
JD/LLB From	**City University of New York School of Law** **http://www.law.cuny.edu**
Date of JD/LLB	**May 12, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**City University of New York Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Twenty-Sixth Annual CUNY Moot Court Summer Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy, Immigration**

Recommenders

Zalesne, Deborah
Zalesne@law.cuny.edu
_718_ 340-4328

Aggrey, Risa
raggrey@nycourts.gov
(646) 696-4314

Capulong, Eduardo R. C.
eduardo.capulong@law.cuny.edu
718-340-4607

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Glenn Lutzky
116 East 117th Street, Apt. 2S
New York, NY 10035

May 16, 2023

Honorable Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
201 West Broad Avenue
Albany, GA 31701

Dear Judge Gardner:

I am writing to apply for a 2024–2026 term clerkship in your chambers. I am a 2023 graduate of the City University of New York School of Law and was the co-Managing Articles Editor for the *City University of New York Law Review*. Through overseeing half of the journal's print pieces, authoring two notes, and my upcoming clerkship, I am developing critical analysis, writing, legal research, and collaboration skills that would benefit this position. As I plan to pursue a public interest legal career, I would look forward to clerking with your honor.

I would bring to the clerkship a broad array of experiences in legal work; before law school, I volunteered at a weekly pro se asylum legal clinic and worked as a bankruptcy paralegal at a small firm. My clerkship, beginning in August, with a New Jersey Superior Court judge will further elevate my skills in researching various areas of the law, as well as writing draft decisions and bench memoranda. I will also be privileged to build on the skills I gained in my mediation clinic by serving as a mediator during my clerkship. My academic year internship with a New York State judge allowed me to write many draft decisions and learn about court procedures.

In addition to my internships, I wrote a paper for an independent study about how judges across the country have interpreted leases in disputes where commercial tenants did not pay rent due to COVID-19. The paper allowed me to research recent and historical court decisions and review case filings. I am delighted to share that the Saint Louis University Law Journal has published it. This summer, the CUNY International Law Journal will also publish my paper on lessons learned from Chile's recent constitutional convention and plebiscite.

I am confident I would be an asset to your chambers; my various experiences in law have helped me cultivate my skill set. Additionally, I believe my attention to detail and collaborative attitude would serve this clerkship well. I would also look forward to clerking for a fellow Brown alum as I enjoyed engaging with many self-directed students who were always eager to explore new interests during college. Thank you very kindly for your consideration. I am available at your convenience for an interview. Please contact me at (914) 960-3250 or glenn.lutzky@live.law.cuny.edu if you need any information.

Respectfully,

Glenn Lutzky

GLENN LUTZKY

116 EAST 117TH STREET, APT. 2S, NEW YORK, NY 10035 ● (914) 960-3250 ● GLENN.LUTZKY@LIVE.LAW.CUNY.EDU

EDUCATION

CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
Juris Doctor, May 2023 | GPA: 3.825
Activities: CUNY Law Review, Managing Articles Editor (2022–2023), Staff Editor, (2021–2022); CUNY Moot Court, Member; CUNY OUTLaws, Member; New York City Bar Association Compliance Committee, Student Member (2021–2022); First-Year Lawyering Seminar (Legal Writing Class) & Writing Center Bluebook Citation Assistant (2022–2023); Lawyering Seminar Writing Mentor; Scribes-American Society of Legal Writers, Student-Editor Member

Honors: CUNY Moot Court Summer Competition, Summer 2021, Best Brief Third Place Award; The New York Bar Foundation, Catalyst Public Service Fellow, Summer 2021

BROWN UNIVERSITY
Bachelor of Arts (International Relations), May 2012
Activities: Study Abroad Program in Salamanca, Spain, Spring 2011; Photo Editor and Photographer, Brown Daily Herald

EXPERIENCE

Judge Haekyoung Suh, New Jersey Superior Court, *Prospective Law Clerk* August 2023 – August 2024
Expected roles are writing bench memoranda and draft orders and opinions, interacting with counsel and self-represented litigants, communicating with the public, conducting mediations, assisting with case management, and managing the motion calendar.

Mediation Clinic, Main Street Legal Services, Inc., *Student Attorney* August 2022 – December 2022
Under attorney supervision, mediated Equal Employment Opportunity Commission and Small Claims matters.

New York State Office of the Attorney General, Westchester Regional Office
Summer Legal Intern Summer 2022
Assisted attorneys in defensive matters. Drafted motions. Wrote memoranda of law in preparation for trials and wrote claim settlement recommendations. Attended trials, court hearings, and depositions.

Justice Lisa S. Headley, Supreme Court of New York, *Judicial Intern* September 2021 – April 2022
Wrote draft decisions on motions (summary judgment, dismissal, default, consolidation/joinder). Researched procedural, evidentiary, and jurisdictional issues.

Catholic Charities Immigration Special Projects, *Summer Legal Intern* Summer 2021
Prepared asylum declarations, applications, briefs, and annotated tables of contents. Researched country conditions for asylum cases. Analyzed changes in asylum case law and policies. Interviewed clients.

Congregation Beit Simchat Torah, *Pro Se Asylum Legal Clinic Volunteer* April 2019 – July 2020
Assisted clients with asylum applications. Drafted affidavits and compiled supporting documents.

Jayson Lutzky, P.C., *Bankruptcy Paralegal* November 2016 – July 2020
Conducted intake interviews. Reviewed financial documents. Prepared petitions and e-filed petitions using CM/ECF. Interacted with trustees. Prepared subpoenas and orders to show cause for matrimonial cases.
Director of Marketing June 2012 – November 2016
Launched law firm website. Wrote and edited blogs, newsletters, landing pages, and e-books.

PUBLICATIONS: Glenn Lutzky, Note, *Lather, Rinse, Repeat: Lessons Learned from Chile's 2022 Constitutional Plebiscite*, 2 CUNY INT'L L.J. (forthcoming Aug. 2023).

Glenn Lutzky, Note, *COVID and Consequences: How the Pandemic Changed Contract Interpretation and Litigation*, 67 ST. LOUIS U. L.J. 167 (2022).

LANGUAGES: Spanish (proficient), French (conversant)

INTERESTS: Digital Photography, Adventure Travel, Classical and Pop Music, Piano

Law Student Copy Academic Record

Name: Glenn Lutzky
Student ID: 13003240

Birthdate: 02/23
Student Address: 116 E 117th St Apt 2S
New York, NY 10035-4667
Print Date: 06/07/2023

Other Institutions Attended:

Academic Program History

Program: Law
06/29/2020: Active in Program
06/29/2020: Law JD Major

---------- **Beginning of Law Record** ----------

2020 Fall Term

Course	Description	Earn	Grd
LAW 701	Contract Law Market Economy I	3.00	CR
Contact Hours:	3.00		
LAW 705	Legal Research	2.00	CR
Contact Hours:	2.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7004	Lawyering Seminar I	4.00	CR
Contact Hours:	4.00		
LAW 7043	Liberty Equality & Due Process	3.00	CR
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		
LAW 7131	Crim L-Rsp Inj Condu	3.00	CR
Contact Hours:	3.00		
Course Attributes:	ZERO Textbook Cost		

Academic Standing Effective 03/13/2021: Good Academic Standing

2021 Spring Term

Course	Description	Earn	Grd
LAW 702	Contracts: LME II	3.00	A-
Contact Hours:	3.00		
LAW 709	Civil Procedure	3.00	B
Contact Hours:	3.00		
LAW 7005	Lawyering Seminar II	4.00	A-
Contact Hours:	4.00		
LAW 7141	Torts-Rsp Inj Conduc	3.00	A
Contact Hours:	3.00		
LAW 7161	Law and Family Relations	2.00	A
Contact Hours:	2.00		

2021 Fall Term

Course	Description	Earn	Grd
LAW 7151	Property: Law & Market Eco III	4.00	A
Contact Hours:	4.00		
LAW 7192	Constitutional Structures	3.00	A
Contact Hours:	3.00		
Course Attributes:	Low Textbook Cost		
LAW 7292	Evidence-L&Pub Int 1	4.00	A-
Contact Hours:	4.00		
LAW 7726	Topics In Law	2.00	A-
Course Topic:	Writing for the Court		
Contact Hours:	2.00		

2022 Spring Term

Course	Description	Earn	Grd
LAW 738	Professional Responsibility	2.00	A-
Contact Hours:	2.00		
LAW 772	Independent Study	3.00	A
Contact Hours:	3.00		
LAW 780	Criminal Procedure: Investigat	3.00	A
Contact Hours:	3.00		
LAW 825	Lawyering Seminar III	4.00	A
Course Topic:	COMM & ECON DEVELPMT		
Contact Hours:	4.00		
Course Attributes:	Low Textbook Cost		
LAW 7251	Public Institutions/Admin Law	3.00	B+
Contact Hours:	3.00		

Academic Standing Effective 06/28/2022: Good Academic Standing

2022 Fall Term

Course	Description	Earn	Grd
LAW 7572	Business Associations	3.00	A
Contact Hours:	3.00		
LAW 7751	Mediation Clinic	12.00	A
Contact Hours:	12.00		

Academic Standing Effective 01/18/2023: Good Academic Standing

2023 Spring Term

Course	Description	Earn	Grd
LAW 751	Wills and Trusts	3.00	A
Contact Hours:	3.00		
LAW 774	Human Rights Law	2.00	A
Contact Hours:	2.00		
LAW 785	Employment Law	3.00	A
Contact Hours:	3.00		
LAW 804	Law Review Editing	3.00	CR
Contact Hours:	3.00		
LAW 7261	Federal Courts	3.00	A
Contact Hours:	3.00		

Degrees Awarded

Degree: Juris Doctor
Confer Date: 06/06/2023
Plan: Law

End of Law Student Copy Academic Record

Glenn Lutzky

2020 Fall Term > Law > School of Law

Class Grades - 2020 Fall Term

Class	Description	Units	Grading	Grade	Grade Points
LAW 701	Contract Law Market Economy I	3.00	Graduate Letter Grades	**A-**	11.100
LAW 705	Legal Research	2.00	Graduate Letter Grades	**A**	8.000
LAW 7004	Lawyering Seminar I	4.00	Graduate Letter Grades	**A-**	14.800
LAW 7043	Liberty Equality & Due Process	3.00	Graduate Letter Grades	**B+**	9.900
LAW 7131	Crim L-Rsp Inj Condu	3.00	Graduate Letter Grades	**A-**	11.100

Term Statistics - 2020 Fall Term

	From Enrollment		Cumulative Total
Units Toward GPA:			
Taken	15.000		15.000
Passed	15.000		15.000
Units Not for GPA:			
Taken			
Passed			
GPA Calculation			
Total Grade Points	54.900		54.900
/ Units Taken Toward GPA	15.000		15.000
= GPA	**3.660**		**3.660**

Academic Standing Good Academic Standing

Return to View My Grades

TRANSCRIPT EXPLANATION

ACCREDITATION
CUNY School of Law is accredited by the American Bar Association (ABA) and is a member of the Association of American Law Schools (AALS).

FOR STUDENTS WHO ENTERED THE LAW SCHOOL PRIOR TO FALL 1996
The following grading system was in effect:
P (Pass)
F (Fail)

FROM FALL 1996 – SUMMER 1999
The following grading system was in effect:

P+ (Pass Plus), P (Pass), P- (Pass Minus), F (Fail)

- Grades for all first-year courses taken in the first year were recorded on the transcript as **P** or **F**;
- The grades of **CR** and **F** were the only grades for the courses Individual Skills Development and Legal Methods;
- The grades of **CR** or **F** appear on the transcript for those electives (up to a total of four) for which student has chosen the **CR/F** option.

AS OF FALL 1999
Beginning Fall Semester of 1999, the following grading system is in effect for all students:

A, A-, B+, B, B-, C+, C, C-, D, F

- The grades of **CR** (**Credit**) and **NC** (**No Credit**) are recorded on the transcript for all first-year, first-semester students;
- The grades of **CR** and **F** are the only grades for the following courses:
  Civil Process & Professional Responsibility, Individual Skills Development, Law Review, Legal Methods, Legal Process, Moot Court;
- The grades of **CR** or **F** appear on the transcript for those electives (up to a total of four) for which the student has chosen the **CR/F** option.

EFFECTIVE SPRING 2012

The grades of **CR** or **NCL** appear on the transcript for those electives (up to a total of four) for which the student has chosen the CR/NCL option. Successful completion of such courses is indicated by a grade of CR. Unsuccessful completion is indicated by a grade of NCL.

OTHER TRANSCRIPT ABBREVIATIONS AND SYMBOLS

AUD	(Audited Course)
INC	(Incomplete)
FIN	(F grade from an Incomplete)
PEN	(Grade Pending)
W	(Official Withdrawal)
WA	(Administrative Withdrawal)
WN	(Never Attended)
WU	(Unofficial Withdrawal)
Z	(No grade submitted by instructor)

All Spring/Fall 2020 grades were earned during a major disruption to instruction as a result of the COVID-19 pandemic.

CUNY School of Law does not rank its students nor does it provide grade point averages.
Questions about the Law School's grading system should be directed to the Office of Academic Affairs (718) 340-4370.

The Family Education Rights and Privacy Act (FERPA) of 1974, as amended, prohibits release of this record to a third party without the written consent of the student.

The City University of New York
CUNY SCHOOL OF LAW
Law in the Service of Human Needs

Office of Registration & Student Records Management
2 Court Square
Long Island, New York 11101
Tel. 718-340-4237 / Fax 718-340-4234

May 16, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am pleased to write a letter recommending Glenn Lutzky for a federal clerkship. Mr. Lutzky was a student in my Contracts I and II classes during his first two semesters of law school last year so I got to know him quite well, even though class was completely remote at that time. This year I've gotten to evaluate his work in closer detail, as I supervised a directed research project he did.

Based on these interactions, I can say definitively that Mr. Lutzky is a serious student with excellent legal reasoning and writing skills. He reads cases with attention to detail and uses them effectively to make persuasive legal arguments. He is a highly-structured thinker and passionate about CUNY Law's public service values. He excelled in Contracts both in terms of his final grades and in his engagement and class participation, where he consistently elevated the level of class discussions by challenging assumptions and raising important issues in a thoughtful way.

I got to know Mr. Lutzky better this year while supervising his independent study about how force majeure clauses in contracts have been interpreted in light of COVID and the unforeseeable pandemic. Mr. Lutzky took the initiative to start work on this paper even before formally starting the independent study, because it is a topic that interested him during his time in my Contracts class. His research was extremely thorough and organized, his writing style is persuasive, and overall his work was thoughtful, critical, and professional. Substantively, he has some really interesting ideas that I will incorporate into my own teaching of the relevant topics. His paper is already of publishable quality, and because it is so timely, I am confident he will be able to place it with a very good journal.

In sum, I am confident Mr. Lutzky will continue to distinguish himself in whatever endeavors he undertakes. I recommend him without hesitation. If you would like additional information, please feel free to call me at 646.637.3708.

Sincerely,

Deborah Zalesne
Professor of Law

Deborah Zalesne - Deborah.Zalesne@law.cuny.edu - (718) 340-4328

Risa Aggrey, Esq.
Supreme Court of New York
80 Centre Street
New York, NY 10007
raggrey@nycourts.gov
(646) 696-4314

June 17, 2022

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing this letter of recommendation for Glenn Lutzky. Glenn worked directly with me as a judicial intern beginning in the fall of 2021, and I actually offered him an extension through the spring of 2022. I believe my offer to extend his internship is a testament to his quality work ethic and work product. The nature of Glenn's internship was virtual, and his primary role was to draft written decisions on motions submitted to the chambers of the Hon. Lisa S. Headley. I am Judge Headley's principal law clerk, and I was the direct supervisor of Glenn. I assigned him decisions to draft for the court, and I also reviewed and finalized all of his work product.

Glenn's primary responsibilities included reviewing and drafting decisions on motions submitted to the court. Glenn was assigned to draft decisions on several types of motions, including, but not limited to, summary judgment motions, motions to amend the pleadings, and motions to consolidate. Glenn's work required him to perform legal research on Westlaw or Lexis Nexis. Also, Glenn mastered navigating the New York State Courts Electronic Filing website, where all the court cases are electronically filed. Glenn and I had several meetings via Microsoft Teams to review and provide feedback on his decision drafts. I can attest that during my meetings with him, he was very professional and attentive to the feedback of his written work. I have noticed that since his first assignment at the beginning of his internship through his final written product, there was much improvement in his legal writing. Glenn is very thorough and demonstrated his analytical skills through his written product as well as during our conversations and e-mail communications. Specifically, Glenn submitted detailed questions and/or comments to cases in which he was assigned, which demonstrated his understanding and critical analysis of the motion papers.

It was my pleasure to work with Glenn in this unique and virtual capacity. I submit this letter of recommendation without hesitation. I believe Glenn has the skills and abilities to succeed as a Staff Attorney.

Please feel free to contact me if you require additional information.

Sincerely,

Risa Aggrey, Esq.
Principal Court Attorney to Hon. Lisa S. Headley

May 16, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

Glenn Lutzky is, in my opinion, particularly suited to the work of the judicial clerk. Skilled in legal analysis and writing, I've no doubt he will be an asset to your chambers.

Glenn was my Lawyering seminar student in the Spring of 2021. At CUNY Law, we require three semesters of Lawyering, two in the first year and one in the second. The Lawyering Program, which I direct, is our students' introduction to the school's experiential program. Among other skills, we teach legal analysis and writing, fact-development, and oral advocacy. In the first semester (Lawyering Seminar I), students concentrate on predictive writing and draft an interoffice memorandum of law; in the second (Lawyering Seminar II), they concentrate on persuasive writing and draft a brief.

Glenn was a student in my Lawyering Seminar II class. For that class, students wrote a brief involving a New York State family law statute prescribing parents' minimum duty of care to supervise their children. In his brief, Glenn demonstrated a nuanced understanding of the statute and controlling cases, how these authorities applied to the set of facts, and the likely outcome of such application. Second-semester law students are, of course, still novices in this basic lawyering chore. But Glenn exhibited a firm grasp of it and an ease in working with the legal method. In addition, it was a pleasure discussing the case during our individual feedback meetings: Glenn dissected the finer points of the doctrine, showed great interest in the nuances of legal language, and displayed admirable sensitivity to the parties involved (simulated as they were). In a word, Glenn was a joy to work with.

I recommend him highly to your chambers.

Very truly yours,

Eduardo R.C. Capulong
Former Interim Dean, Professor of Law, and Director,
Lawyering Program

Eduardo R. C. Capulong - eduardo.capulong@law.cuny.edu - 718-340-4607

Glenn Lutzky

Writing Sample Introduction

This writing sample is an excerpt from the paper I wrote for my Spring 2022 independent study. The paper analyzes how courts have interpreted language in leases after landlords sued commercial tenants who did not pay rent due to COVID-19 restrictions that affected their businesses. The paper allowed me to explore many federal and state decisions from trial and appellate courts across the country. I also reviewed court filings.

The paper is unedited to the extent that I received guidance from my professor in refining the topic. I also received very general feedback on the first few pages of the paper early in the writing process, some assistance in crafting doctrinal definitions, and was encouraged to bolster certain transitions.

I have omitted sections from the paper as indicated. Also, I have omitted several case discussions and shortened the section containing my recommendations. The cases I chose to keep in the sample interact well with each other, offering contrasting results based on similar facts. I can provide the full paper upon request.

Glenn Lutzky Writing Sample

COVID AND CONSEQUENCES: HOW THE PANDEMIC CHANGED CONTRACT INTERPRETATION AND LITIGATION

INTRODUCTION

At the beginning of the COVID-19 pandemic, governors ordered many nonessential businesses to temporarily close or operate at a reduced capacity to mitigate the public health threat posed by COVID-19.[1] Consequently, those businesses suffered revenue shortfalls,[2] and some could not maintain contractual obligations, such as paying rent.[3] Initial advisory memos written by law firms interpreting force majeure clauses did not encourage clients to breach their contracts by stopping rent payments, based on the expectation that courts would not excuse their performance.[4] However, courts have taken various and sometimes contradictory approaches to excusing performance.[5] In general, courts only excuse performance if parties have contracted for a specific and unambiguous situation in advance that explicitly excuses performance.[6] Courts

[1] *See, e.g.*, N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.8.pdf; Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf.
[2] *See* ALEXANDER W. BARTIK ET AL., HOW ARE SMALL BUSINESSES ADJUSTING TO COVID-19? EARLY EVIDENCE FROM A SURVEY - NBER WORKING PAPER NO. 26989, at 9-10 (2020), https://www.nber.org/system/files/working_papers/w26989/w26989.pdf (noting that many small businesses did not have sufficient cash on hand to maintain operations during the early part of the pandemic); DELOITTE, COVID-19: MANAGING CASH FLOW DURING A PERIOD OF CRISIS 2 (2020), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-COVID-19-managing-cash-flow-in-crisis.pdf (highlighting low cash reserves and unstable cash flows in a wide variety of industries and business sizes at the onset of the pandemic).
[3] *See* Konrad Putzier & Esther Fung, *Businesses Can't Pay Rent. That's a Threat to the $3 Trillion Commercial Mortgage* Market, WALL ST. J. (Mar. 24, 2020, 8:00 AM), https://www.wsj.com/articles/businesses-cant-pay-rent-thats-a-threat-to-the-3-trillion-commercial-mortgage-market-11585051201; *see also The Effect of Government Stimulus on Commercial Real Estate amid COVID-19*, MCKINSEY & CO. (Jan. 20, 2021) (discussing the effects of government stimulus packages on businesses and commercial properties).
[4] Stanford Law School has compiled a searchable database of more than 4,000 memoranda prepared by law firms, audit firms, and other business advisors related to COVID-19 topics. Press Release, Stan. L. Sch., Stanford Law School Launches COVID-19 Memo Database in Collaboration with Cornerstone Research (Apr. 15, 2020), https://law.stanford.edu/press/stanford-law-school-launches-covid-19-memo-database-in-collaboration-with-cornerstone-research/.
[5] *See* discussion *infra* Part III.
[6] *See* discussion *infra* Part III.

seldom accept post hoc theories and arguments that seek to redefine parties' intentions and obligations at the time of contracting.[7] In upholding contracts as written, courts rarely grant parties a windfall.[8]

This paper begins with an overview of the current doctrines of force majeure, impracticability and impossibility, and frustration of purpose. It then studies the types of language used in contracts that allocate risk—foreseen and unforeseen—and how that language affects a court's decision when one party sues seeking relief due to another party's nonperformance. Specifically, it first examines how courts have interpreted force majeure clauses in commercial leases, especially in businesses where governmental restrictions required them to operate at reduced capacity. Second, it examines how courts have interpreted commercial leases where the purpose of the lease is specified. Third, the article examines how courts interpreted leases of businesses that sold alcohol in the early twentieth century when counties, states, and, later, the nation banned alcohol production and sale. As far as reasoning goes, courts are exceptionally hesitant to reallocate risk between sophisticated parties and generally find that financial difficulty is not enough to excuse performance.[9] Finally this article concludes with guidance for drafting contracts based on courts' current semantic interpretations.

I. THE COVID-19 PANDEMIC

[omitted]

II. CURRENT DOCTRINE

A. Force Majeure Clauses

[7] *See* discussion *infra* Part III.
[8] *See* discussion *infra* Part III.
[9] *See generally* Swata Gandhi, *Force Majeure and Contracting Strategies for the COVID-19 Era*, PRAC. LAW., Aug. 2021, at 55, 55.

Contracts often contain force majeure clauses designed to excuse one or both parties from performance upon triggering events such as acts of God,[10] governmental regulations, floods, or labor strikes.[11] The force majeure clause must define the breach for which the promisor seeks to be excused, define the force majeure event, require, and define a causal nexus between the breach and the event, and explain the remedy if performance is excused.[12]

A court may interpret a force majeure clause in a commercial lease as excusing a tenant's rent obligation.[13] Courts typically interpret force majeure clauses narrowly, especially when the parties are sophisticated commercial parties with equal bargaining power.[14] Few reported decisions involve force majeure clauses that explicitly contain the word "pandemic" as a force majeure event.[15] While most states do not require force majeure clauses to include the specific

[10] Courts have interpreted act of God provisions and when they are triggered. *See, e.g.*, *In re* Flood Litigation, 607 S.E.2d 863, 877-78 (W. Va. 2004) ("'[A]n 'Act of God' is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.' In contrast, '[t]hat which reasonable human foresight, pains, and care should have prevented can not be called an act of God.'") (second alteration in original) (citation omitted); Gleeson v. Va. Midland R.R. Co., 140 U.S. 435 (1891); Cormack v. New York, N.H. & H.R. Co., 90 N.E. 56 (N.Y. 1909). Black's Law Dictionary defines an act of God as, "[a]n overwhelming, unpreventable event caused exclusively by force of nature, such as an earthquake, flood, or tornado." *Act of God*, BLACK'S LAW DICTIONARY (11th ed. 2019). California's Public Contract Code defines an act of God as "earthquakes in excess of a magnitude of 3.5 on the Richter Scale and tidal waves." CAL. PUB. CONT. CODE § 7105(b)(2) (West 2022). *See generally* 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 59:29 (4th ed. 2021) (applying acts of God to the law of carriers).

[11] J. Hunter Robinson et al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TRIAL ADVOC. 1, 8 (2020); Jessica S. Hoppe & William S. Wright, *Force Majeure - Clauses in Leases*, PROB. & PROP., Mar.-Apr. 2007, at 8, 9.

[12] Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR. ASS'N (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/. See Christian Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 - Change of Circumstances,* Force Majeure*, or what?* COLUM. L. SCH. (Apr. 20, 2020), https://scholarship.law.columbia.edu/books/240/ for a discussion of the impact of force majeure clauses on commercial contracts during the onset of the COVID-19 pandemic in United States and foreign jurisdictions. *See generally* 14 JOSEPH M. PERILLO & JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 74.19 (2022) (discussing force majeure clauses).

[13] *See* discussion *infra* Section III.A.

[14] Hoppe & Wright, *supra* note 11, at 10.

[15] A Westlaw search for cases conducted May 28, 2022 for "'force majeure' /p pandemic" in all state and federal jurisdictions retrieved 116 results. Four of those results were cases which listed pandemics or epidemics as a force majeure clause. *See* Huth v. Am. Inst. for Foreign Study, Inc., No. 20-CV-01786, 2022 WL 834419 (D. Conn. Mar. 21, 2022); Republican Party of Tex. v. Hous. First Corp., No. 14-20-00744-CV, 2022 WL 619708 (Tex. App. Mar.

event that triggers the clause for these affirmative defenses to succeed in courts, New York courts ordinarily require that the clause lists the events.[16] Moreover, events that occur with regularity may cease to be considered force majeure events.[17]

B. Impracticability and Impossibility

[omitted]

C. Frustration of Purpose

[omitted]

III. PANDEMIC CASE REVIEW

A. Offering and Denying Relief Under Force Majeure Clauses

Many courts have refused to excuse performance during the pandemic based on precisely worded force majeure clauses. For example, in *In re CEC Entertainment, Inc.* a bankruptcy court held that the pandemic did not excuse the operator of Chuck E. Cheese ("CEC") restaurant and entertainment venues from paying rent during the pandemic under the force majeure clause of its leases and under the doctrine of frustration of purpose.[18] CEC's business model relied heavily on a combination of entertainment and dining, as half of their revenue came from the former and 30% from the latter.[19] Many landlords initially objected to CEC's rent abatement motion but resolved their objections, leaving the court to interpret six leases from venues across three

3, 2022); Zhao v. CIEE Inc., 3 F.4th 1 (1st Cir. 2021); Denbury Onshore, LLC v. APMTG Helium, 476 P.3d 1098 (Wyo. 2020).

[16] Hoppe & Wright, *supra* note 11, at 9; One World Trade Ctr., LLC v. Cantor Fitzgerald Sec., 789 N.Y.S.2d 652, 655 (Sup. Ct. 2004) (quoting Kel Kim Corp. v. Cent. Mkts., Inc. 519 N.E.2d 295, 296 (N.Y. 1987)) ("The general rule is that '[o]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.") (alteration in original).

[17] Hoppe & Wright, supra note 11, at 11-12 (discussing catastrophic weather events). [I have omitted the rest of this footnote. I discussed other public health emergencies, such as the recurrence of Ebola and new cases of an avian fu.]

[18] *In re* CEC Ent., Inc., 625 B.R. 344, 353, 364 (Bankr. S.D. Tex. 2020).

[19] *Id.* at 349.

states.[20] The Bankruptcy Code lets debtors suspend lease payments on nonresidential real property for a short time for cause.[21] However, debtors like CEC and other businesses sought more extensive relief, such as complete or partial rent abatement.

The court analyzed six force majeure clauses from the venues' leases and concluded that five were very similar in structure.[22] They all list acts of God and governmental restrictions as well as several other events as events that could trigger the force majeure clause. Critically, the clauses end with a sentence that states that the force majeure clause does not apply if either party lacked funds. For example, the Greensboro, North Carolina lease states:

> [I]f either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by any . . . act of God, unusual governmental restriction, regulation or control, . . . then the time to perform such obligation or to satisfy such condition shall be extended on a day-for-day basis for the period of the delay caused by such event. . . . This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise money or inability to raise capital or borrow for any purpose.[23]

CEC argued that the pandemic was both an act of God and that governors' orders restricting indoor dining and the operation of arcades triggered the government restriction event in the force majeure clause and should excuse the company's rent obligations.[24] However, the court declined to determine whether these events triggered the force majeure clause because it reasoned that the final sentence of the force majeure clause, the lack of fund provision, did not allow for a rent

[20] *Id.*
[21] *Id.* at 353. A court may delay lease payments on nonresidential real property for 60 days when a corporation files for bankruptcy. 11 U.S.C. § 365(d)(3). A court may delay payments for an additional 60 days for subchapter V debtors who are experiencing a COVID-19 hardship. *Id.* § 365(d)(3)(B)(i).
[22] *CEC Ent.*, 625 B.R. at 353-57. The Granada Hills, California lease contained an anti-force majeure clause that required performance "even in the face of 'acts of God, or any other cause beyond the reasonable control of either party.'" *Id*. at 356.
[23] *Id.* at 353-54 (emphasis omitted).
[24] *Id.* at 354.

abatement.[25] The court applied state contract law to each of the six clauses and came to the same conclusion.[26] Notably, the Lynnwood, Washington, lease differs from the five other leases because it has an explicit anti-force majeure provision that force majeure events do not excuse the tenant's duty to pay rent.[27] In assessing CEC's frustration of purpose defenses, the court reasoned the force majeure clauses superseded CEC's frustration of purpose defenses.[28]

On the other hand, some courts have offered partial relief in cases involving almost identical force majeure clauses. For example, while the court in *CEC Entertainment* offered no relief, another bankruptcy court in *In re Hitz Restaurant Group* offered partial rent relief to a restaurant that faced similar governmental orders.[29] Utilizing case law, the *Hitz* court resolved a dispute according to the general/specific canon of interpretation.[30] Under this canon, specific provisions prevail when there is a conflict between a general provision and a specific provision in a statute or contract.[31]

Hitz's landlord sought an order for Hitz to pay post-petition rent.[32] The court found that Illinois Governor J. B. Pritzker's March 16, 2020, executive order that banned on-premises food or beverage consumption triggered the force majeure clause in the restaurant's lease,[33] which

[25] *Id.*
[26] *Id.* at 353-57.
[27] *Id.* at 355.
[28] *Id.* at 358-363.
[29] *In re* Hitz Rest. Grp., 616 B.R. 374, 380 (Bankr. N.D. Ill. 2020). The company filed for Chapter 11 protection on February 24, 2020, so its March 2020 rent would have been its first month of post-petition rent due under 11 U.S.C. § 365(d)(3). *Id*.
[30] The general/specific canon states that where there are conflicting provisions that cannot be reconciled, the specific provision prevails. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183-188 (2012). The reasoning behind this canon is that a "specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *Id.* at 183.
[31] *Id.*
[32] *Hitz*, 616 B.R. at 376.
[33] *Id.* at 377-78.

contained standard force majeure triggering events and ended with a lack of money provision, akin to the leases in *CEC Entertainment*:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented, retarded or hindered by . . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.[34]

The court looked to Illinois case law which states that force majeure clauses "excuse contractual nonperformance if the triggering event cited by the party was, in fact, the proximate cause of the party's nonperformance."[35] In the eyes of the court, Governor Pritzker's executive order was a government action that was the proximate cause that prevented the restaurant from offering indoor dining.

Unlike in *CEC Entertainment*, the *Hitz* court found the "governmental action" provision and the lack of money provision to be in conflict.[36] The court cited a Seventh Circuit case that reasoned that the most specific provision should control when contract terms are in dispute.[37] The *Hitz* court reasoned that Governor Pritzker's executive order was the direct and proximate cause of the restaurant's inability to pay post-petition rent (a specific event) and that a lessee can lack money for many reasons (a general circumstance).[38] Further, the court rejected the landlord's argument that the restaurant could have sought a Small Business Administration loan to pay the rent because the force majeure clause did not require the affected party to borrow money to counteract its nonperformance.[39]

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[34] *Id.* at 376-77.
[35] *Id.* at 377.
[36] *Id.* at 378 n.2
[37] *Id.*
[38] *Id.*
[39] *Id.* at 378.

However, the court did not entirely excuse the restaurant from its rent obligation. Because Governor Pritzker's executive order allowed off-premises consumption through means such as delivery or takeout, the court ordered the restaurant to pay 25% of its rent, common area maintenance fees, and real estate taxes from March 2020 to June 2020, the period the restaurant was closed except for takeout, because the restaurant's kitchen comprised 25% of the square footage of the restaurant.[40] Interestingly, and perhaps to its detriment, the landlord did not address the issue of partial rent reduction.[41]

B. Relief Interpreting Specific Purposes

Some commercial leases explicitly identify a specific purpose for which tenants may use their leased premises through a specific limited use clause, also called a permissible use provision.[42] For example, the lease in *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc.* specifies that the tenant, Caffé Nero on 205-207 Newbury Street in Boston, Massachusetts, could only use the leased premises for "[t]he operation of a Caffé Nero themed café under Tenant's Trade Name and for no other purpose."[43] The lease requires the tenant to operate this location similar to the other Caffé Nero locations in the Greater Boston region.[44] In the words of the court's decision in an order on a motion for partial summary judgment, the Caffé Nero business model was "to serve great coffee and food that customers could enjoy and linger over in

[40] *Id.* at 379-80.
[41] *Id.* at 379.
[42] *See generally* STUART M. SAFT, COMMERCIAL REAL ESTATE TRANSACTIONS § 10:38 (3d ed. 2021) (discussing use of premises provisions in commercial leases).
[43] UMNV 205-207 Newbury, LLC v. Caffé Nero Ams. Inc., No. 2084CV01493-BLS2, 2021 Mass. Super. LEXIS 12, at *3 (Super. Ct. Feb. 8, 2021).
[44] *Id.*

a comfortable indoor space."[45] Further, the Newbury Street location lease stated that takeout sales were only available from the café's regular sit-down menu.[46]

Massachusetts Governor Baker's executive order prevented Caffé Nero from offering indoor food and beverage services beginning March 24, 2020.[47] Consequently, Caffé Nero could not run its business and abide by its lease's specific limited use clause. As a result, it stopped paying rent in March 2020.[48] Eventually, in June 2020, Caffé Nero reopened at a limited capacity as permitted by the state's phased reopening plan.[49] Ultimately, it vacated its premises on October 29, 2020.[50]

Caffé Nero has a standard force majeure provision in its lease, which the court found addressed the doctrine of impossibility:

> Neither the Landlord nor the Tenant shall be liable for failure to perform any obligation under this Lease, except for the payment of money, in the event it is prevented from so performing by . . . order or regulation of or by any governmental authority . . . or for any other cause beyond its reasonable control, but financial inability shall never be deemed to be a cause beyond a party's reasonable control . . . and in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing.[51]

However, the court found that the force majeure clause did not address the "risk that the performance could still be possible even while main [sic] purpose of the [l]ease is frustrated by events not in the parties' control."[52] The inclusion of the two exceptions to the clause's applicability for "financial inability" or the failure to make a "payment of money" are indications

[45] *Id.*
[46] *Id.*
[47] *Id.* at *4.
[48] *Id.* at *6-7.
[49] *Id.*
[50] *Id.*
[51] *Id.* at *14 (emphasis omitted).
[52] *Id.* at *14-15.

that the parties could perform their obligations even if it the purpose of the lease was frustrated.[53] Hence, the frustration of purpose defense was available to the tenant and was not precluded by the force majeure clause.[54] Therefore, in a rare decision, the court discharged Caffé Nero's rent obligation from March 24, 2020, through June 22, 2020.[55]

Other specific limited use clauses include language that makes it more difficult for courts to excuse performance entirely. For example, in *STORE SPE LA Fitness v. Fitness International Inc.*, a landlord sued the owners of three fitness centers for breach of contract to recover rent and for damages to one of the center's HVAC systems.[56] The centers did not pay rent while closed to follow Kentucky Governor Beshear's executive orders.[57] The court addressed the fitness centers' arguments based on the force majeure provisions and the doctrines of impossibility, impracticability, frustration of purpose, failure of consideration, and condemnation.[58]

The lease for two fitness center locations included the same specific limited use clauses that differ significantly from those found in other leases, such as the Caffé Nero lease. The clause includes a list of fitness center-related uses but also states that, "[t]enant shall use the Leased Premises . . . for any other lawful purposes with the prior written consent of Landlord."[59] Nevertheless, the fitness centers argued that the court should apply the frustration of purpose reasoning from *Caffé Nero* because they could not operate the fitness centers during the months

[53] *Id.*
[54] *Id.* at *15.
[55] *Id.* at *19.
[56] STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036, at *1-2 (C.D. Cal. filed June 30, 2021).
[57] *Id.*
[58] *Id.* at *7-12.
[59] Lease Between Royce G. Pullman M & A, LLC and Global Fitness Holdings, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-6 [hereinafter *Edge O Lake Lease*]; Lease Between Royce G. Pullman M & A, LLC and Palumbo Drive Fitness, LLC § 1.1(d), STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 63-7 [hereinafter *Blake James Lease*].

the governor's executive order required them to stay closed.[60] The fitness centers also cited a case like *Caffé Nero* where a Michigan court excused a commercial tenant from its rent obligation.[61] The court rejected these analogies because the specific limited use clause let the fitness centers request permission to use the premises for another purpose. [62] Hence, the purpose of the lease was not frustrated.[63] However, Governor Beshear's March 26, 2020 executive order only allowed "life-sustaining businesses" to remain open effective March 26, 2020.[64] Also, the executive order required businesses that could stay open to implement social distancing and enhanced hygiene measures.[65] Thus, it is not certain whether the two fitness centers could have repurposed themselves even if the landlord consented.

The court also rejected the fitness centers' argument that they did not receive the benefit of their bargain while they were closed.[66] The fitness centers had exclusive possession of the premises even though it was temporarily illegal to use them as fitness centers.[67] The fitness center also argued that the executive order constituted a temporary taking under two leases, which have condemnation clauses that discuss appropriation and takings by public authorities, so the temporary taking should excuse the centers of their rent obligations.[68]

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[60] Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment at 14-15, STORE SPE LA Fitness v. Fitness Int'l, LLC, No. SACV 20-953, 2021 WL 3285036 (C.D. Cal. filed June 30, 2021), ECF No. 68.
[61] *Id.* at 15. *See also* Bay City Realty, LLC v. Mattress Firm, Inc., No. 20-CV-11498, 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021) (releasing a bedding store from its obligation to pay rent for two months while the store was closed due to Governor Whitmer's executive order under the doctrine of frustration of purpose).
[62] *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.
[63] *Id.*
[64] Ky. Exec. Order No. 2020-257 (Mar. 25, 2020), https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf. The Executive Order listed 19 categories of life-sustaining business that could remain open in addition to federally designated critical infrastructure sector businesses. *Id.*
[65] *STORE SPE LA Fitness*, 2021 WL 3285036, at *10.
[66] *Id.*
[67] *Id.*
[68] *Id.*; *Edge O Lake Lease*, *supra* note 59, § 4.2; *Blake James Lease*, *supra* note 59, § 4.2. *Cf.* JWC Fitness, LLC v. Murphy, 265 A.3d 164 (N.J. Super. Ct. App. Div. 2021) (recognizing that Governor Murphy's executive orders temporarily closing and placing restrictions on a kickboxing gym did not effectuate a compensable physical or regulatory taking of property).

The fitness centers argued that the force majeure clauses in their leases should have excused their rent obligations. However, they asserted to the court that they could pay their rent, so the clauses, which required an inability to perform, could not excuse their obligations. Moreover, even if they were excused, all three leases included force majeure clauses that extended the time for performance if a force majeure clause caused a delay.[69] For example, the Edge O Lake location and the Blake James location leases state:

> If either party is delayed or prevented from any of its obligations under this Lease by any reason of strike, labor troubles or any other cause whatsoever beyond such party's control, then the period of such delay or such prevention shall be deemed added to the time provided herein for the performance of any such obligation.[70]

Unlike some other force majeure clauses in commercial leases, this clause states that performance is only delayed for the time performance was prevented.[71] Thus, it would be very difficult to read this clause as completely abating rent.[72]

The court further rejected the fitness centers' impossibility and impracticability arguments for the same reason it rejected the force majeure argument—the fitness centers had shown they had the ability to pay the rent due, so the pandemic did not make performance impossible despite their loss of revenue.[73]

STORE SPE LA Fitness v. Fitness International Inc. is a notable case because the parties seeking rent abatement conceded their ability to pay, which prevented using the force majeure clause to excuse performance. Gyms generally operate on an automatically recurring

[69] *STORE SPE LA Fitness*, 2021 WL 3285036, at *7-8.
[70] *Id.* at *8.
[71] Compare *supra* text accompanying notes 23, [omitted], 70 (providing for addition to time provided to perform obligation), *with supra* text accompanying notes 34, [omitted], 51, [omitted] (providing for no addition to time perform obligation).
[72] *STORE SPE LA Fitness*, 2021 WL 3285036, at *8.
[73] *Id.*

membership model that provides a relatively stable revenue stream.[74] On the other hand, restaurants, which operate on small profit margins,[75] seem less likely to maintain enough revenue streams when closed or operating at partial capacity. Courts have proven hesitant to reallocate contracting risk between sophisticated parties. While courts typically interpret contracts against the drafter, courts are less likely to follow that principle when the parties are sophisticated businesses with equal bargaining power.[76]

IV. PROHIBITION-ERA COMMERCIAL LEASE CASES INVOLVING SPECIFIC LIMITED USE CLAUSES

[omitted]

V. RECOMMENDATIONS FOR DRAFTING

Two main issues in commercial leasing emerge from the pandemic: how courts will interpret leases where one party fails to perform and how transactional lawyers can draft leases and other contracts moving forward to avoid litigation from similar future occurrences. Trial courts heard most cases discussed in this article; however, there are already cases on appeal, and some appellate courts have issued decisions.[77] Still, patterns in judges' reasoning have emerged. Courts are reading lease provisions closely, construing contracts as a whole, and responding to parties' good faith arguments. Courts have been hesitant to reallocate the risk between

[74] *See* Cheryl Wischhover, *Gyms Aren't Making It Easy for People to Cancel Memberships*, VOX (Oct. 9, 2020, 7:00 AM), https://www.vox.com/the-goods/21497534/cancel-gym-membership-crunch-equinox-planet-fitness (reporting difficulties consumers faced when attempting to cancel gym memberships during the onset of pandemic).
[75] Stefon Walters, *The Average Profit Margin for a Restaurant*, USA TODAY (Aug. 22, 2019), https://yourbusiness.azcentral.com/average-profit-margin-restaurant-13113.html (noting that full-service restaurants generally have profit margins between 3% and 5%).
[76] *See, e.g.*, Hoppe & Wright *supra* note 11, at 9.
[77] *See, e.g.*, JN Contemporary Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118 (2d Cir. 2022) (affirming lower court's holdings that COVID-19 pandemic and resulting governor's orders restricting nonessential businesses triggered a force majeure contract in an auction house's consignment and sales agreement and that the parties' agreement did not require the auction house to conduct another auction); AGW Sono Partners, LLC v. Downtown Soho, LLC, 273 A.3d 186 (Conn. 2022) (affirming lower court's holdings that restaurant tenant that breached lease agreement by failing to pay rent during the pandemic was not entitled to relief under impossibility and frustration of purpose).

commercially sophisticated parties where they have already contracted for it in a provision such as a force majeure clause.

Lawyers who draft leases should consider writing new force majeure clauses considering how judges have construed their terms to date. There will likely be additional global viral outbreaks due to modern human social practices,[78] so lawyers should prepare accordingly. Clauses that define force majeure events in detail avoid confusion. Equally importantly, the scope of relief should be well thought out.

Lawyers and businessowners should consider whether government orders should be a force majeure event based on their business or industry. If the business would be impacted by a government shutdown, the parties should consider various scenarios, such as a complete shutdown versus a partial shutdown and the length of the shutdown. Parties may wish to include relief dependent on the exact event. For example, a restaurant may consider offering to pay rent based on revenue rather than a base rent during a partial shutdown. Landlords would need immediate access to reliable financial records in this circumstance. While landlords would not receive full rent, this compromise could prevent or discourage a tenant from withholding rent, filing for bankruptcy, or closing entirely. Had the parties added a clause like this in their leases, then the *Hitz* and *CEC Entertainment* decisions could be reconciled more easily. Parties can determine how to handle certain situations in advance and avoid the need for costly litigation that might produce uncertain outcomes dependent on jurisdiction and judicial assignment. Drafters

[78] Jon Hilsenrath, *Global Viral Outbreaks like Coronavirus, Once Rare, Will Become More Common*, WALL ST. J. (Mar. 6, 2002, 5:30 AM), https://www.wsj.com/articles/viral-outbreaks-once-rare-become-part-of-the-global-landscape-11583455309 (noting urbanization, globalization, and increased human consumption of animal proteins are causing an increase in the number of epidemics); *Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 1, 2021), https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html (noting that three-quarters of new or emerging infectious diseases in people come from animals); *see also* sources cited *supra* note 17.

can use the provision in *Securities Trust & Savings Bank*[a] as a starting point. It gave the landlord sole discretion over the new rent if the city went dry. The clause in *Securities Trust & Savings Bank* ultimately led to litigation, so parties should be more forward-thinking and specify any precise rent adjustment if business operations are suspended or limited.

CONCLUSION

The COVID-19 pandemic exposed many ambiguities in contracts and leases that seemed clear and workable before. Moving forward, parties should attempt to be as specific as they can in leases, given the high stakes businesses face when relying on these documents. Lawyers must continue to consider the consequences of specific limited use clauses, force majeure clauses, and any interaction between the two when they write contracts.

The pandemic has highlighted several novel issues in the interpretation of contracts in the aftermath of government-mandated shutdowns. Parties will likely remain in dispute over pandemic-related contract terms for a long time. It is unlikely that COVID-19 will be the last global pandemic; local and regional health emergencies will continue to arise as well. By learning from issues that surfaced in pandemic contract disputes, drafters can work to write leases that will withstand other types of new disasters, government regulations, and unpredictable business outcomes. The pandemic has caused significant loss, changed people's habits forever, and may bring more surprises. The tensions exposed in leases have signaled the need for precise drafting that is durable yet adaptable to new and evolving situations.

[a] *Securities Trust & Savings Bank* is discussed in Part IV (Prohibition-Era Commercial Lease Cases Involving Specific Limited Use Clauses), which has been omitted in this writing sample. The five-year lease in *Securities Trust & Savings Bank* has a specific limited use clause that allows the tenant to use the premises as a "general retail liquor establishment." Sec. Tr. & Sav. Bank v. Claussen, 187 P. 140, 140 (Cal. Dist. Ct. App. 1919). The lease also permits the landlord to grand a rent reduction of an amount in its discretion if the city where the bar was located enacted dry laws. *Id.*

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Address	**Address** Street **1119 Plymouth Drive, Apt. 107** City **Champaign** State/Territory **Illinois** Zip **61821**
Contact Phone Number	**(937) 654-7621**

Applicant Education

BA/BS From	**Xavier University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Illinois, College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp**
Date of JD/LLB	**May 15, 2024**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Amar, Vik
amar@illinois.edu
Tony, Ghiotto
aghiotto@illinois.edu
Pea, Janice
j-pea@illinois.edu
This applicant has certified that all data entered in this profile and any application documents are true and correct.

Trisha A. Makley

1119 Plymouth Drive, Apt. 107, Champaign, IL 61821 • tmakley2@illinois.edu • (937) 654-762

The Honorable Leslie Gardner
United States District Court for the Middle District of Georgia

June 12, 2023

Dear Judge Gardner,

As a former public-school teacher in the Bronx, I am committed to public service and using my legal education to create a more just society. While at University of Illinois College of Law, I had the great honor to meet you and discuss clerkships. I appreciated your commitment to public service and support for teachers! I hope to bring my passion for public service and my legal writing skills to your chambers in 2024.

First, I have a strong background in public service as a former educator in New York City, as an intern with the NAACP Legal Defense and Education Fund ("LDF"), and as an intern with the Champaign County Public Defender. Before attending law school, I taught for five years at Truman High School in the Bronx. After witnessing five years of systemic injustices, I decided to attend law school and use my legal education to help create a more equitable public school system. While working at LDF last summer, I primarily worked with the education team on Title VI and Title IX litigation. Not only did I gain valuable education law and policy experience, but I honed my legal research and writing skills in other areas, such as racially biased policing practices and § 2 of the Voting Rights Act. As an intern with the public defender, I researched Fourth Amendment violations and met with clients at the county jail. In the future, I hope to focus my career on education or criminal justice civil rights litigation.

Second, I have strong legal writing skills through classwork and hands-on experience. This past semester, I took a judicial opinion writing class where we researched and wrote an opinion on a case before the Illinois Supreme Court. I read the parties' briefs, wrote a bench memo with questions for oral argument, listened to oral arguments, and a wrote a final opinion. As an extern with Judge Valderrama in the Northern District of Illinois, I researched Second Amendment claims and authored an opinion on a motion to dismiss an indictment, a first for Judge Valderrama's chambers. Both situations taught me how to write in a fair, impartial manner while also adopting the style of another writer.

I am confident that my passion for public service and my legal writing skills will make me an effective contributor in your chambers. If you are looking to interview someone committed to public service, I would welcome the opportunity for an in-person or virtual interview. You may reach me at (937) 654-7621 or tmakley2@illinois.edu at your earliest convenience.

Thank you for your consideration,

Trisha Makley

Trisha A. Makley

1119 Plymouth Drive, Apt. 107, Champaign, IL 61821 • tmakley2@illinois.edu • (937) 654-7621

EDUCATION

University of Illinois College of Law: Champaign, Illinois
Juris Doctor Candidate, **GPA:** 3.53/4.0, Top 1/3 of Class **Expected May 2024**

- Harno Scholar (Top 10%, Spring '22), Dean's List (Fall '22), CALI Award in Poverty and the Law (Spring '23)
- First Amendment Clinic, Trial Team, Women's Law Society Executive Board
- Constitutional Law Teaching Assistant to Dean Vikram Amar

CUNY Herbert H. Lehman College: Bronx, New York
Master of Science in Education, **GPA:** 4.00/4.00 **May 2018**

- Thesis: *Urban Public School Funding and Science Education: A Look at Equity in NYC*
- Segal AmeriCorps Education Award

Xavier University: Cincinnati, Ohio
Bachelor of Arts in English, minor in writing, *cum laude* **May 2015**
Bachelor of Science in Biology, *cum laude*

- *Xavier University Journal of Undergraduate Research,* Editor

EXPERIENCE

United States District Court for the Northern District of Illinois: Chicago, Illinois **May 2023 – August 2023**
Judicial Extern to the Honorable Franklin Valderrama

- Researched Second Amendment claims post-*Bruen* and authored an opinion on a motion to dismiss

Champaign County Public Defender's Office: Urbana, Illinois **August 2022 – December 2022**
Extern

- Researched legal concepts to help in defense proceedings, including *Terry* stops, Fourth Amendment violations, and exceptions to hearsay
- Analyzed discovery files and met with clients to prepare for trial or plea strategy

NAACP Legal Defense and Education Fund: Washington, D.C. **May 2022 – August 2022**
Litigation Intern, Education, Criminal Justice Reform, Voting Rights

- Authored a 31-page memorandum analyzing Los Angeles County Sheriff's Department's reform efforts to mitigate their unconstitutional and racially biased policing
- Investigated Title VI and IX allegations and drafted a letter to the Office of Civil Rights detailing a racially hostile school environment
- Researched and wrote about advanced legal topics such as sovereign immunity, § 2 of the Voting Rights Act, and exceptions to the work product doctrine
- Analyzed discovery files, school board meetings, and state education standards/policies to prepare for client meetings and future litigation

Harry S. Truman High School: Bronx, New York **May 2016 – June 2021**
Teacher, Biology and AP Environmental Science

- Communicated complex information, both verbally and in writing, in a clear and concise manner to students from diverse educational backgrounds

Cengage Learning: Cincinnati, Ohio **July 2015 – May 2016**
Product Assistant, Accounting Team

- Developed an accounting textbook, including managing content development

UNIVERSITY OF ILLINOIS URBANA - CHAMPAIGN

Urbana, Illinois 61801

Student Name: Makley, Trisha A

University ID: 676904829 **Issue Date:** 12 - Jun - 23

Level: Law - Urbana-Champaign **Day - Month of Birth:** 17 - Sep

Most Recent Program(s)
College : Law
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021 - Urbana-Champaign						
Law						
Law						
LAW	601	Contracts	4.00	B+	13.32	
LAW	602	Property	4.00	C+	9.32	
LAW	604	Criminal Law	4.00	B+	13.32	
LAW	609	Legal Writing & Analysis	2.00	A-	7.34	
LAW	627	Legal Research	1.00	A-	3.67	
	Ehrs: 15.00 GPA-Hrs: 15.00 QPts:		46.97	GPA:	3.13	
Spring 2022 - Urbana-Champaign						
Law						
Law						
LAW	603	Torts	4.00	A-	14.68	
LAW	606	Constitutional Law I	4.00	A-	14.68	
LAW	607	Civil Procedure	4.00	A-	14.68	
LAW	610	Introduction to Advocacy	3.00	A-	11.01	
LAW	792	Fund of Legal Practice	1.00	S	0.00	
	Ehrs: 16.00 GPA-Hrs: 15.00 QPts:		55.05	GPA:	3.67	
Harno Scholar						
Summer 2022 - Urbana-Champaign						
Law						
Law						
LAW	692	Summer Externships	4.00	S	0.00	
LAW	792	Racial Justice Practicum	1.00	S	0.00	
	Ehrs: 5.00 GPA-Hrs: 0.00 QPts:		0.00	GPA:	0.00	
Fall 2022 - Urbana-Champaign						
Law						
Law						
LAW	605	Criminal Proc: Investigation	3.00	A-	11.01	
LAW	682	Evidence	3.00	A	12.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	692	Advanced Fall Externship	2.00	S	0.00	
LAW	694	Trial Advocacy	2.00	B+	6.66	
LAW	694	Trial Team	2.00	A	8.00	
LAW	695	Trial Advocacy Workshop	3.00	S	0.00	
LAW	792	Election Law	2.00	A-	7.34	
	Ehrs: 17.00 GPA-Hrs: 12.00 QPts:		45.01	GPA:	3.75	
Spring 2023 - Urbana-Champaign						
Law						
Law						
LAW	600	Pro Bono Service	0.00	S	0.00	
LAW	679	Criminal Proc: Adjudication	3.00	A-	11.01	
LAW	694	Adv Criminal Trial Advocacy	3.00	A-	11.01	
LAW	694	Trial Team	2.00	A	8.00	
LAW	696	Law Teaching Practicum	2.00	S	0.00	
LAW	792	Judicial Opinion Writing	2.00	S	0.00	
LAW	792	Poverty & the Law	2.00	A+	8.00	
LAW	798	First Amendment	2.00	B	6.00	
	Ehrs: 16.00 GPA-Hrs: 12.00 QPts:		44.02	GPA:	3.66	
Summer 2023 - Urbana-Champaign						
IN PROGRESS WORK						
LAW	692	Advanced Summer Externship II	3.00	IN PROGRESS		
		In Progress Credits 3.00				

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	69.00	54.00	191.05	3.53
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	69.00	54.00	191.05	3.53

********** END OF TRANSCRIPT **********

University of College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

June 14, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

It is with true pleasure that I write to recommend Trisha Makley to serve as a law clerk in your chambers. Trisha is an excellent law student and a fine person; I have every confidence she will make a very successful law clerk.

I go to know Trisha a bit during her first year of law school, when she was a student in the required first-year Constitutional Law class I teach. I am known in the building as among the most demanding classroom teachers, especially in my insistence that students carefully parse the text of cases and learn the ins and outs of complex constitutional doctrine (something I think too few law clerks and other junior lawyers have really mastered). Trisha's oral contributions to the class sessions, while not overly frequent, were consistently thoughtful and helpful. Her exam shined; I typically give fewer than 15% of the students As or A-minuses on their tests, but Trisha was one of them. Her exam performance displayed understanding of the deep themes of the U.S. Constitution, a sophisticated understanding of the caselaw and how it might apply to new situations, and good feel for the relationship between the two. Her exam was straightforwardly organized and clearly written.

Based largely on her performance in my class, I selected Trisha to be the (sole) Teaching Assistant for my 1L Con Law class this last spring (of 2023). (I almost never hire a 2L as opposed to a 3L, but in this case I was glad I did.) Trisha excelled in the role. She met regularly with students, both individually and in groups, to hold periodic review sessions and to address emerging or continuing confusion about various topics and cases, and the feedback I got from the 1Ls was terrific. There is an adage that you don't know something until you can teach it to someone else; I think the converse – that if you can effectively teach something to someone else, then you know it well yourself – is perhaps even more true. In any event, I believe the skills Trisha displayed as a TA – ability to speak about the law crisply, to engage arguments and counter-arguments, to discern what a conversation partner seems to be understanding and seems to be missing, etc. -- indicate great potential to be a high-performing law clerk, since in my experience clerks who can talk intelligently and clearly about the law with the judge, each other and any externs are particularly effective. It does not surprise me that Trisha earned an MS in Education (with a perfect 4.0 GPA) and taught for five years before coming to law school.

A few words about Trisha's work ethic and passion for public law and public service: As a first-generation college student, she has made the most of her educational opportunities. She earned bachelor's degrees in both Biology and English (showing her intellectual range) in four years. She has consistently maintained good marks at every level of higher education, including law school grades that place her in the top fifth or so of her class. Out of many opportunities, she chose to work for the NAACP LDF, and when doing so produced a careful and powerful 31-page memorandum seeking to document unconstitutional and racially biased policing in Los Angeles County. Her research topics in law school have focused on public law issues, such as such as sovereign immunity, § 2 of the Voting Rights Act and Fourth Amendment Terry stops. This summer she opted to work for a federal judge in Chicago so she could focus specifically § 1983 cases. She was selected to be in the inaugural group of students this fall to participate in the College of Law's new First Amendment clinic. And her transcript more generally shows deep interest in all aspects of public law, including election law. I say this not to suggest that Trisha wouldn't do a terrific job assisting you in a wide range of private law cases too, but at a time when questions about the future of criminal justice, the nature of government and about democracy itself run deep in America, having clerks with the background Trisha brings is increasingly important.

As for temperament, from what I can tell, Trisha is an unfailingly pleasant and upbeat person, who enjoys working with other people and who would be a pleasure to have in chambers. I think she definitely warrants your serious consideration and an interview to see if there is a good fit.

If I can provide any more helpful information, please let me know by emailing me or calling me.

Best wishes,
VA

Vikram D. Amar
Dean
Iwan Foundation Professor of Law

Vik Amar - amar@illinois.edu

June 13, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write to enthusiastically recommend Ms. Trisha Makley for a clerkship this upcoming term. Ms. Makley is a stellar law student with a demonstrated desire to excel and to serve the larger community. She is one of our top students at the University of Illinois College of Law and I have no doubt that she has the legal and personal skills to be a highly successful clerk for you.

I first met Ms. Makley this past fall when I joined our faculty as the Director of the Anderson Center for Advocacy and Professionalism. I had the pleasure of both teaching Ms. Makley in Trial Advocacy and coaching her mock trial team. Her poise and competency were evident right away. She was prepared, focused, and engaged from day-one of class and trial preparation. I found her ability and knowledge to be well-above that of her peers.

I also had the chance to have several conversations with her outside the classroom about her experiences as a teacher and goals for her legal career. In these conversations, she displayed a level of humanity and understanding of the call to service involved with a legal career that I have rarely seen in my six years of worming in legal education.

Her classroom and exam performance did not disappoint – she was one of my top students and her final courtroom performance exhibited a mastery of the material that reflected a tireless work ethic, a sharp and focused mind,
and the ability to apply the law to difficult and complex fact pattern.

Overall, as a second year law student, I found Ms. Makley's initiative and intellectual curiosity to surpass that of her peers. She is driven by a desire to better herself and the legal environment and it was my pleasure getting to teach her and to advise her. She constantly surprised me with the depth of her
knowledge and her willingness to go above and beyond. Learning trial advocacy can be difficult and demanding and Ms. Makley was always able to advocate her position with respect and diligence, while also accomplishing her argument. I wish that all my students were as capable as Ms. Makley and I have no doubt that she will have a long and successful legal career.

Beyond the classroom, I have found Ms. Makley to be professional and personable. She engages with much of the Illinois College of Law faculty and she is often a faculty “go-to” student. With her peers, she appears to be a great colleague. She supports her fellow classmates and establishes a collegial and professional environment at Illinois. She is able to work well with everyone and is not afraid to voice a well-reasoned legal argument, even if it runs counter to her professors. I have read a fair amount of her writing and I find it to be high quality in comparison to her peers. She writes in a clear manner and her research skills are impeccable.

I am happy to discuss Ms. Makley's candidacy further at your convenience. Please do not hesitate to contact me either via email or phone at (210) 639-0563 or aghiotto@illinois.edu.

University of College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

June 13, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am pleased to offer this recommendation for Trisha Makley, who has applied for a clerkship in your chambers. Trisha is a second-year law student at the University of Illinois College of Law and is presently enrolled in my Judicial Opinion Writing seminar.

I developed this course several years ago for the purpose of preparing our most promising students for the role of judicial law clerk. In addition to readings, discussions, and guest speakers on topics related to opinion writing, judicial decision making, and professionalism and ethics for law clerks, the students in this seminar have had the opportunity to work as "law clerks" on cases currently pending before the Illinois Supreme Court.

Trisha chose the case of People v. Washington, which was argued before the court in January 2023. She prepared a bench memo, viewed the oral argument, and prepared two drafts of an opinion. As you can see from her resume and course selection, Trisha has an abiding interest in procedural justice. Thus, it was not surprising that she chose to work on a case involving a defendant who served twenty-five years in prison for a murder he did not commit.

Trisha wrestled with subtle issues in this case involving Mr. Washington's eligibility for a Certificate of Innocence (COI) after he was exonerated. The trial court denied his petition for a COI based on his having pleaded guilty as part of a plea bargain. The appellate court reversed. While the issue appeared to be a straight-forward question of statutory interpretation (does a defendant who pleads guilty "cause" his own conviction?), the question was complicated by the fact that the State did not deny that Mr. Washington had been tortured during questioning and that his confession was coerced. In short, Trisha, acting as law clerk, was tasked with drafting an opinion that dealt not only with a question of statutory interpretation, but also with questions of legislative intent, public policy, and fundamental fairness.

Her goal in this endeavor has not been to predict how the seven members of the Illinois Supreme Court will rule in this case. Rather, her goal has been to produce an opinion that a fictional judge would be willing to circulate to his or her colleagues as a proposed opinion. She has done a fine job, concluding that, as a matter of law, a guilty plea does not categorically preclude an exonerated defendant from obtaining a COI. Applying to the facts, her draft opinion would hold that Mr. Washington proved, by a preponderance of the evidence, he did not freely cause his conviction because his will was overcome as a result of torture and coercion and by the fact that the other defendant in the case, who was also exonerated, received a seventy-five-year sentence after a jury trial.

The Illinois Supreme Court has not yet issued its opinion in People v. Washington, and it will be interesting to see if the opinion reaches the same result, remanding the matter to the trial court with instructions to issue the COI. In any event, Trisha has drafted an opinion of which she can be proud.

In addition to working on her own opinion, Trisha peer edited the draft opinion of another member of the class who was working on a different case − in the same manner that co-clerks cooperate and collaborate in chambers. Her editorial suggestions were excellent, and her classmate valued her input. Similarly, she graciously and gratefully accepted comments from him. Thus, Trisha can not only produce the work expected of a judicial law clerk, she also understands the job.

Over the course of the semester, we discussed a wide range of topics including the writing styles of different judges, the use of cultural or literary references in judicial opinions, the use of judicial dicta, and the influence of concurrences and dissents. Trisha gave an interesting report on cases citing the works of Franz Kafka, Kurt Vonnegut, and George Orwell. She selected Citizens United v. Federal Election Commission (2010), as her presentation on an important dissent. It, of course, remains to be seen whether the dissent will have any influence in the future.

In sum, Trisha Makley has a strong work ethic. Her writing is concise and well-reasoned, and her legal analysis is supported by thorough and insightful research. She appreciates the role of a judicial law clerk and is capable of adjusting her writing style to suit the judge for whom she is clerking. Academically, her performance has improved every semester, placing her in the top 25% of her class. She has a pleasant personality and a cooperative demeanor, which will serve her well in the close environment of a judicial chambers.

Finally, my background includes working for twenty years as senior law clerk to a member of the Illinois Supreme Court. In my clerkship role, I screened applications and interviewed clerkship candidates. In my teaching role, I have taught over 1,000 law students. I can say, without reservation, that Trisha Makley is well-qualified to serve as a judicial law clerk. I hope that you will take the opportunity to meet this fine young woman.

Janice Pea - j-pea@illinois.edu

Very truly yours,

Janice Farrell Pea
Lecturer in Law

Janice Pea - j-pea@illinois.edu

Trisha A. Makley

1119 Plymouth Drive, Apt. 107, Champaign, IL 61821 • tmakley2@illinois.edu • (937) 654-7621

WRITING SAMPLE

This writing sample comes from a Judicial Opinion Writing class. It is based on a real case before the Illinois Supreme Court: *The People of the State of Illinois v. Wayne Washington*. We read the briefs from the parties and amicus briefs, then had to research and write our own opinion. The appeal centered on two issues: (1) statutory interpretation of Illinois law that provides exonerees with a Certificate of Innocence, and (2) whether Mr. Washington voluntarily pleaded guilty. This is my final draft of the opinion and has not been altered by my professor.

OPINION

In this appeal, we are asked to decide what "voluntarily cause or bring about a conviction" means within 735 ILCS 5/2-702(g)(4), and whether Mr. Washington voluntarily caused his conviction and should be barred from receiving a Certificate of Innocence. For the following reasons, we conclude that petitioners must show by a preponderance of the evidence that they did not freely cause their conviction or that their will was overcome to qualify for a Certificate of Innocence. Further, we reverse the judgments of the appellate court and circuit court and remand to the circuit court with directions to issue Mr. Washington a Certificate of Innocence.

BACKGROUND

I. Arrest, Conviction, and Exoneration

On May 17, 1993, Wayne Washington and his eventual codefendant, Tyrone Hood, were arrested for murder. According to Washington, two police officers repeatedly beat him and kicked over a chair he was handcuffed to during an interrogation that lasted longer than twenty-four hours. At the end of this interrogation, Washington signed a statement falsely confessing to the murder. These officers also allegedly beat Hood and other witnesses into providing false testimony against Washington. At Washington's first trial, he pleaded not guilty, but the jury was unable to reach a verdict. Washington spoke to Hood, who was also innocent, and learned that Hood had gone to trial and

been sentenced to seventy-five years in prison. Washington decided to take a plea deal for twenty-five years and pleaded guilty.

After serving his sentence, the State successfully moved in 2015 to vacate both Hood's and Washington's convictions and grant the two men new trials. The State then dismissed all charges against both men. The question of whether Washington is innocent of the murder charges is undisputed. The State agrees that Washington is innocent.

II. Petition for Certificate of Innocence

Washington filed a petition for a Certificate of Innocence ("COI") after his sentence was vacated by the State. At the hearing, the State did not present a case against Washington. During the hearing, Washington presented evidence that his confession and subsequent guilty plea were coerced. This evidence included Washington's testimony of his own abuse, but also four types of corroborating evidence: (1) evidence that the same officers abused and coerced other witnesses in Washington's case; (2) an expert report from the former Chicago Police Superintendent that concluded that the officers engaged in a pattern of malpractice that was present in Washington's case; (3) detailed allegations that the same officers had abused and coerced people in over twenty separate cases; and (4) evidence from other proceedings where the officers took the Fifth Amendment when asked whether they abused

Washington. The State presented no evidence to dispute Washington's testimony or any of the evidence he submitted during the hearing.

After the hearing ended, the circuit court *sua sponte* announced its intention to take judicial notice of the transcript from Hood's and Washington's previous trials. As this was after the hearing ended, Washington never had a chance to rebut or challenge these materials.

The circuit court denied Washington's petition, finding that he had voluntarily caused his own conviction. It dismissed his claims of coercion by stating the following:

> First, petitioner's allegations are vague and non-specific. Petitioner does not identify the officer or officers who allegedly coerced his statement and only makes generalized statements that he was knocked to the ground. Petitioner has also failed to substantiate this claim with any evidence. Petitioner has not attached affidavits or other documents to support the allegation that he was abused or that the unnamed detectives responsible are implicated in similar cases of abuse.

People v. Washington, No. 93-CR-14676, 2016 WL 11752849, at *3 (Ill. Cir. Ct. Oct. 31, 2016). The circuit court also stated that Washington was not credible because there were differences between his testimony during the COI hearing and his testimony from the judicially noticed materials. *Id*.

The appellate court affirmed, with one justice dissenting. *People v. Washington*, 2020 IL App (1st) 163024, ¶ 1, ¶ 35. Washington filed a timely appeal to this court, and we allowed petitioner's leave to appeal pursuant to Illinois Supreme Court Rule 315 (eff. Oct. 1, 2021).

ANALYSIS

To qualify for a COI, petitioners must prove four elements under 735 ILSC 5/2-702(g). The fourth element, the only one at issue, states that a petitioner must prove that they "did not by his or her own conduct voluntarily cause or bring about his or her conviction." 735 ILCS 5/2-702(g)(4). The first question is one of statutory interpretation: what does "voluntarily cause or bring about a conviction" mean in 735 ILCS 5/2-702(g)(4)? The second question is of fact: did Washington voluntarily cause his conviction?

I. Statutory Interpretation of 735 ILCS 5/2-702(g)(4)

The basic principle of statutory interpretation is to effectuate the legislature's intent. *People v. Palmer*, 2021 IL 125621, ¶ 53. Plain meaning is often the best way to ascertain the legislature's intent, unless the statutory language is unclear or ambiguous. *Rudy v. People*, 2013 IL App (1st) 113449, ¶ 12. A statute is considered ambiguous if it is capable of more than one reasonable interpretation. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11. If it is ambiguous, the Court can also consider other indications of legislative intent, such as the purpose of the statute. *Palmer*, 2021 IL 125621, ¶ 53. The Court assumes that the General Assembly acts with knowledge of our previous decisions. *United States v. Glispie*, 2020 IL 125483, ¶ 10. However, we cannot rewrite a statute under the guise of statutory interpretation. *People v. Taylor*, 221 Ill. 2d 157, 162

(2006). As statutory interpretation is a question of law, we review the appellate court decision *de novo*. *Palmer*, 2021 IL 125621, ¶ 53.

The State argues that the fourth element requires that a voluntary guilty plea bars a petitioner from obtaining a COI. First, it argues that a guilty plea causes a conviction, and, therefore, a voluntary guilty plea would preclude a petitioner from obtaining a COI. The State then argues that the meaning of "voluntary" should be derived from the United States Supreme Court's Fifth Amendment jurisprudence.

Washington argues that the fourth element indicates that a guilty plea would only foreclose relief when the petitioner "culpably misled police or other officials." *Washington*, 2020 IL App (1st) 163024, ¶ 48 (Walker, P.J., dissenting).

We reject both arguments. As the meaning of the statute is ambiguous, we reject the State's plain meaning analysis and turn to other methods of statutory interpretation. The statute as a whole, the application of the statute, and the legislative history indicate that the legislature did not intend to incorporate a Fifth Amendment standard into the fourth element. However, the legislative intent also indicates that the legislature did not intend to replace the word "voluntarily," with "culpably." Instead, we turn to our jurisprudence to establish the meaning of "voluntary" and a test to determine whether an action is voluntary.

A. Plain Meaning Analysis of 735 ILCS 5/2-702(g)(4)

Three different interpretations of 735 ILCS 5/2-702(g)(4) have been proposed by three different appellate court districts. First, in *People v. Dumas*, the Second District suggested that the fourth prong should reflect the culpability standard in *Betts v. United States*. *People v. Dumas*, 2013 IL App (2d) 120561, ¶ 18. Specifically, for the petitioner to have caused their conviction, they "must have acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense.'" *Id.* (quoting *Betts v. United States,* 10 F.3d 1278, 1283 (7th Cir.1993)). The court concluded that the plain meaning of 2-702 indicates that the fourth prong serves to separate the actually innocent from those who were released due to an insufficiency of evidence. *Id*. One justice in the First District agreed with this interpretation in his dissent. *Washington*, 2020 IL App (1st) 163024, ¶ 48 (Walker, P.J., dissenting).

Second, the First District stated that the plain meaning of the fourth element indicates that someone who pleaded guilty has caused their own conviction, and therefore they are not entitled to a COI. *People v. Washington*, 2020 IL App (1st) 163024, ¶ 25. The First District implied however that a guilty plea would not be voluntary if the police coerced a petitioner into confessing. *See id.* at ¶ 26.

Third, the Fourth District suggested that pleading guilty is a complete bar to obtaining a COI. *See People v. Brown,* 2022 IL App (4th) 220171, ¶ 32. The court restated

the holding in *People v. Washington* as a "petitioner cannot meet element four if he or she pleaded guilty." *Id*.

Because 735 ILCS 5/2-702(g)(4) is capable of more than one reasonable interpretation, it is ambiguous. We turn now to other methods of statutory interpretation.

B. Statutory Interpretation

Other sections of the statute indicate that the purpose of the statute was to remove obstacles to petitioners seeking relief. *Palmer*, 2021 IL 125621, ¶ 68. When determining legislative intent, reviewing courts can consider the purpose of the statute and the consequences of interpreting the statute one way or the other. *Id*. at ¶ 53. The legislature clearly stated the purpose of the statute:

> The General Assembly finds and declares that innocent persons who have been wrongly convicted of crimes in Illinois and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue to obtain a finding of innocence so that they may obtain relief . . .

735 ILCS 5/2-702(a). This Court has stated that 2-702(a) shows the legislature's intent to "ameliorate, not impose, technical and substantive obstacles to petitioners seeking relief." *Palmer*, 2021 IL 125621, ¶ 68. The legislature clearly stated its intent that courts "give due consideration to difficulties of proof" caused by the passage of time, unavailability of witnesses, destruction of evidence, or other factors not caused by the petitioner. 735 ILCS 5/2-702(a).

Incorporating the Fifth Amendment standard into the fourth element would undermine the statutory purpose of lessening technical and substantive obstacles to petitioners seeking relief. Since 2016, seventy-seven Illinoisians who pleaded guilty have been granted a COI. Forcing petitioners to prove that their Fifth Amendment rights were violated would create a new technical and substantive obstacle for petitioners seeking a COI. While a Fifth Amendment violation would be sufficient to render a guilty plea involuntary, it is not necessary to do so. Forcing petitioners to prove a Fifth Amendment violation would also create a more difficult standard of proof, something the legislature explicitly stated it wanted to avoid. Therefore, we decline to incorporate a Fifth Amendment standard when doing so would clearly contradict legislative intent.

Washington argues that the legislative history indicates that the fourth element forecloses relief only when the petitioner culpably misleads police or other officials. Representative Mary Flowers, the chief proponent of the statute, said that its purpose was "to benefit 'men and women that have been falsely incarcerated through no fault of their own."' *Dumas*, 2013 IL App (2d) 120561, ¶¶18-19 (quoting 95th Ill. Gen. Assem., House Proceedings, May 18, 2007 at 12). While this statement by Representative Flowers elucidates the purpose of the statute, it is quite a leap to say that this statement means that we should rewrite the statute from "voluntary" to "culpable." Had the

legislature intended for voluntary to mean culpable, it would have used the word culpable.

This Court's Fifth Amendment's jurisprudence provides a different definition of voluntariness. In the past, we have defined voluntary as "freely . . . without compulsion or inducement of any sort," and as whether the person's "will was overcome." *People v. Richardson*, 234 Ill. 2d 233, 253 (2009). This Court employs a totality of the circumstances test to determine whether a statement was voluntary. *Id*. Factors to consider can include the person's age, intelligence, background, experience, mental capacity, education, physical condition during questioning by police, legality and duration of police questioning, physical or mental abuse by police, or the existence of threats or promises. *Id.* at 254.

While this definition is pulled from our Fifth Amendment jurisprudence, we remain cognizant of the legislature's intent and the reality of our justice system. The legislature did not intend to create a high burden of proof or create obstacles for people seeking a Certificate of Innocence. Further, data shows that 18% of exonerees pleaded guilty. *People v. Reed*, 2020 IL 124940, ¶ 33. As we stated in *Reed*, when there is a compelling showing of true innocence, a voluntary guilty plea is "reduced to a legal fiction." *Id*. at 35. The definition of voluntary and the totality of the circumstances test are a useful framework to help courts determine whether someone "voluntarily cause[d] . . . his or her conviction." 735 ILCS 5/2-702(g)(4). But it is just a framework.

We do not mean to incorporate the full weight of our Fifth Amendment jurisprudence or have all petitioners prove their Fifth Amendment rights were violated. Rather, petitioners must show by a preponderance of the evidence that they did not freely cause their conviction or that their will was overcome. Courts should consider the totality of the circumstances, including the non-exhaustive factors above.

II. Washington's Guilty Plea and the Totality of the Circumstances

We turn next to the trial court's determination that Washington voluntarily caused his conviction. When a trial court makes a finding by the preponderance of the evidence, this Court only reverses when the trial court's decision is against the manifest weight of the evidence. *Best v. Best*, 223 Ill. 2d 342, 348-349 (2006). A finding is against the manifest weight of the evidence when it is unreasonable, arbitrary, or not based on the evidence presented. *Id.* at 349. When making its finding that Washington voluntarily caused his conviction, the court noted that the petitioner did not identify the officers who abused him and failed to substantiate his claim with any evidence other than his testimony. These assertions are both patently wrong and not based on the evidence presented.

The petitioner did submit evidence naming the officers who abused him. Furthermore, the petitioner submitted four types of corroborating evidence: (1) evidence that the same officers abused and coerced other witnesses in the petitioner's case; (2) an expert report from the former Chicago Police Superintendent that concluded

that the officers engaged in a pattern of malpractice; (3) detailed allegations that the same officers had abused and coerced people in over twenty separate cases; and (4) evidence from other proceedings where the officers took the Fifth Amendment when asked whether they abused the petitioner. The circuit court did not explain, nor even mention, why it disregarded this evidence.

Based on the facts in the record, Washington proved by a preponderance of the evidence that his will was overcome and that he did not freely cause his conviction. Using the framework announced above, Washington's confession and subsequent guilty plea were not voluntary. The confession was not voluntary due to the duration of questioning, physical coercion, and promises made by police. Washington's guilty plea was not voluntary due to his experience with the trial process.

While Washington confessed to murder during police questioning, the record makes clear that this was not voluntary. Washington was held by police for a day and a half. He was beaten by police. He was handcuffed to a chair that police repeatedly kicked over. He was told that a confession was his ticket to freedom. The State presented no evidence to dispute Washington's testimony or any of the evidence he submitted during the hearing. The record makes clear that Washington's confession was not voluntary.

Washington's subsequent guilty plea was also involuntary due to his experience with the trial process. Washington pleaded not guilty during his first trial, but the jury

could not reach verdict. On the day he was supposed to be retried, Washington spoke with his co-defendant, Tyrone Hood. Mr. Hood was equally innocent but had been convicted and sentenced to seventy-five years in prison. Due to this experience, Washington decided to plead guilty to prevent spending the rest of his life in prison. Washington's will to maintain his innocence was overcome and he pleaded guilty, but not voluntarily.

The only evidence that Washington's guilty plea was voluntary came from past trial transcripts that the circuit court judicially noticed after the close of Washington's hearing. Washington was never afforded an opportunity to respond to these materials during the hearing. The circuit court erred when it judicially noticed materials after the hearing concluded. Trial courts cannot take judicial notice of facts *sua sponte* after the close of evidence and leave parties deprived of their right to respond to evidence. *People v. Smith*, 2021 IL App (1st) 190421, ¶ 83; *People v. Simon*, 2017 IL App (1st) 152173, ¶ 26. Furthermore, according to the Illinois Rules of Evidence, "a party is entitled . . . to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Ill R. Evid. 201(e).

Based on the facts properly in the record, the circuit court's determination that Washington voluntarily caused his conviction was against the manifest weight of the evidence. Washington proved by a preponderance of the evidence that his will was overcome and that he did not freely cause his conviction. The State argues that we